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No. 94-8729

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

TINA B. BENNIS, Petitioner

v.

STATE OF MICHIGAN ex rel. WAYNE COUNTY PROSECUTOR, Respondent

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On Petition for a Writ of Certiorari to the
Michigan Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a Michigan nuisance abatement statute that permits the forfeiture of a person's property if it is used in a proscribed manner by another person even if the owner had no knowledge of the misuse of the property violates the Due Process Clause of the Fourteenth Amendment and/or the Takings Clause of the Fifth Amendment (as applied to the states by the Fourteenth Amendment); and

2. Whether the application of that statute to deprive a wife of her interest in an automobile she jointly owned with her husband violated the Due Process Clause of the Fourteenth Amendment and the Takings Clause of the Fifth Amendment (as applied to the states by the Fourteenth Amendment), where the forfeiture resulted from a finding that the husband had engaged in a sex act with a reputed prostitute inside the automobile, and where the record established that the wife had no knowledge that her husband would use the car in the manner he was found to have used it.

LIST OF PARTIES

1. State of Michigan ex rel. Wayne County Prosecutor (Plaintiff below and respondent in the U.S. Supreme Court)

2. John Charles Bennis (Defendant below; not joining in this petition for certiorari)

3. Tina B. Bennis (Defendant below and petitioner in the U.S. Supreme Court)

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October Term, 1994

TINA B. BENNIS, Petitioner

v.

STATE OF MICHIGAN ex rel. WAYNE COUNTY PROSECUTOR, Respondent

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PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

Tina B. Bennis respectfully petitions for a writ of certiorari to review the judgment of the Michigan Supreme Court in this case.

OPINIONS BELOW

The decision of the Michigan Supreme Court is reported at 447 Mich. 719, ___ N.W.2d ___ (1994). The opinion of the Michigan Court of Appeals is reported at 504 N.W.2d 731 (1993). The ruling of the trial court (the Wayne County Circuit Court) was made from the bench and was followed by a one-page "order/judgement," which is not reported.

JURISDICTION

The Michigan Supreme Court entered judgment on December 30, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides, in pertinent part, that "[n]o State shall. . .deprive any person of life, liberty, or property, without due process of law. . .." The Fifth Amendment to the U.S. Constitution provides, in pertinent part, that "nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

This case presents in the clearest way an issue which the Supreme Court has previously described as "serious" and one which the Court has formally reserved for decision on several occasions, including most recently in Austin v. United States, 509 U.S. ___, 125 L. Ed. 2d 488 (1993). That issue is whether "forfeiture of a truly innocent owner's property" would comport with the Constitution. 125 L. Ed. 2d at 502.

In this case, the respondent, Wayne County Prosecutor, confiscated a vehicle owned by John and Tina Bennis because John Bennis engaged in a sex act with a reputed prostitute inside the automobile while the car was parked on a city street. The automobile was forfeited under an old Michigan nuisance abatement statute that had never previously been applied in this fashion.[1] The order of forfeiture followed a civil, non-jury trial that was held only days after Tina and John Bennis had answered the complaint brought against them.

Unlike federal drug forfeiture statutes, the Michigan nuisance abatement statute does not exempt "innocent owners" from its application. On the contrary, it expressly provides that proof

[1]This petition for certiorari is being brought only on behalf of Tina Bennis. John C. Bennis, the other joint owner of the automobile, and a co-defendant with Tina Bennis in the nuisance abatement proceeding, is not joining in this petition for certiorari.

of the owner's knowledge of the illegal activity is not required. At trial, Tina Bennis denied having knowledge of her husband's illegal use of the vehicle. No evidence of such knowledge was offered by the Wayne County Prosecutor and the trial judge made no finding that she had such knowledge. The trial court drew no distinction between the forfeitability of her property rights in the car and those of her husband, and ordered the vehicle sold, with the proceeds to be distributed to the police, the County, and the State of Michigan.

Petitioner and her husband appealed to the Michigan Court of Appeals, asserting both statutory and constitutional bases for reversal. That Court reversed the trial court on statutory grounds, and ruled that the Prosecutor had failed to prove the elements of a nuisance under the statute so as to justify forfeiture of either of their interests in the car.

In Michigan ex rel Wayne County Prosecutor v Bennis, 447 Mich. 719, ___ N.W.2d ___ (1994), the Michigan Supreme Court reversed the intermediate appellate court 4 to 3. In so doing, it upheld, inter alia, the forfeiture of petitioner Tina Bennis' interest in the Bennis automobile against a federal constitutional challenge. Petitioner Tina Bennis argued that, as an innocent owner, the forfeiture of her interest in the Bennis car violated the Due Process Clause as well as the Takings Clause of the Fifth Amendment. Three justices of the Michigan Supreme Court joined a plurality opinion for reversal that, inter alia, rejected Tina Bennis' constitutional claim.[2]

The plurality opinion assumed for purposes of its analysis that petitioner had no prior

[2]The opinion reversing the Michigan Court of Appeals was written by Justice Riley and joined by two other justices. Justice Griffin, who provided the fourth vote for reversal, did not join the Justice Riley opinion and concurred in the result only. Bennis, 447 Mich. at 744. The basis for Supreme Court jurisdiction over this case is discussed infra at pages 6-8.

knowledge that her husband would put their car to an illegal use. The opinion then adopted the rule that a person's interest in property can constitutionally be forfeited whenever it is entrusted to another person who uses it illegally, regardless of whether the person entrusting the property has any culpability (including negligence) for the illegal use. As the plurality opinion stated, "The United States Supreme Court indisputably allows forfeiture of an innocent owner's property, unless evidence was submitted that the property was stolen or used without the consent of the owner." Bennis, 447 Mich. at 742.

The Bennis formulation of the constitutional rule, which the plurality opinion inferred from a Prohibition-era U.S. Supreme Court case, cannot be reconciled with the direction of this Court's very recent holdings in forfeiture cases, which were not even mentioned in the plurality opinion. It is also inconsistent with dicta in a 1974 decision of the U.S. Supreme Court that suggested that an owner had to at least be guilty of negligence before his or her property could be forfeited for the acts of another. A number of federal and state cases have used that dicta to fix the minimum degree of culpability the Constitution requires before an owner's interest in property may be forfeited.

The remaining four justices of the Michigan Supreme Court adopted the plurality opinion's view of the permissible scope of forfeitures under the U.S. Constitution either expressly or by implication. The fourth justice who voted for reversal concurred in the result and did not write a separate opinion. But in order to justify his vote for reversal as to Tina Bennis, he, too, necessarily had to reject Tina Bennis' constitutional claim. The three dissenting justices, while disagreeing with the plurality's statutory conclusions, did agree with that part of

the plurality opinion rejecting Tina Bennis' due process claim.[3] Those three justices joined a dissenting opinion that would have held that, as a matter of statutory construction, the misconduct of John Bennis was outside the scope of the act, and that forfeiture of the vehicle was therefore improper. At the same time, the dissenting opinion expressed agreement with the plurality opinion's conclusions concerning the constitutional issue, at least as relates to the due process claim raised on behalf of Tina Bennis. Thus, six justices of the Michigan Supreme Court have construed this Court's prior cases to hold that due process is not violated when an innocent owner's property is forfeited, so long as the property was not stolen or used without the consent of the owner, and a seventh has done the same by necessary implication.

The constitutional issue that petitioner contends was wrongly decided in Bennis is of vital importance to the nation's constitutional jurisprudence. In the last decade or more, federal and state governments have become extremely aggressive in their use of forfeiture statutes, and, as this case attests, have utilized forfeitures in increasingly novel and sweeping ways. Civil forfeiture has offered law enforcement significant procedural advantages over criminal proceedings. In large part, that is because courts until recently have generally held that the constitutional safeguards that protect defendants in criminal cases are inapplicable to civil forfeiture cases. The long trend of judicial deference to forfeitures appears to be changing as the result of recent decisions of the Supreme Court, however.

In 1993, in Austin and a few months later in United States v. Good, 510 U.S. ___, 126

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[3]Chief Justice Cavanagh wrote a dissenting opinion that was joined by Justices Brickley and Levin. 447 Mich. at 744-759. That opinion addresses the constitutional issues at page 752 and in note 8, which begins on that page. Justice Levin also wrote a separate dissenting opinion dealing exclusively with statutory issues. 447 Mich. at 759-764.

L. Ed. 2d. 490 (1993), the Supreme Court imposed two separate constitutional restraints on forfeitures. In so doing, the Court evinced a general "distrust of the Government's aggressive use of broad civil forfeiture statutes," Good, 126 L. Ed. 2d at 521 (Thomas, J., concurring in part and dissenting in part) and a concomitant desire to prevent forfeiture statutes from interfering with property rights in an arbitrary or excessive manner. In addition, the analysis in those cases also revealed a specific concern about protecting innocent owners from deprivation of their property through forfeitures, especially where, as here, the government has a "direct pecuniary interest" in the outcome of the forfeiture proceeding.

The Michigan Supreme Court decision in Bennis on the federal constitutional issue should not be allowed to stand as a precedent in Michigan and as persuasive authority in other jurisdictions faced with issues regarding the constitutionality of forfeitures of property belong to "innocent owners." This Court should grant certiorari with respect to the Supreme Court's ruling regarding Tina Bennis' interest in the automobile, in order to resolve the tension between this Court's early decisions regarding the constitutionality of forfeiture, as applied to innocent owners, and its more recent pronouncements on this issue.

THE BASIS FOR U.S. SUPREME COURT JURISDICTION

Although there is only a plurality opinion for reversal in the Michigan Supreme Court, this Court clearly has jurisdiction to review the judgment in Bennis. First, this Court has previously assumed jurisdiction in cases where there was no majority opinion supporting the state supreme court decision for which review was sought, so long as one of the opinions supporting the decision presented an adequate and independent federal ground as the basis for the holding it was urging. See United Air Lines v. Mahin, 410 U.S. 623, 630-31 (1973) This

case presents an even stronger basis for jurisdiction than Mahin, however. For, as discussed above, three of the four state supreme court justices (rather than two of four in Mahin) joined an opinion that clearly has an adequate and independent federal ground as the basis for the holding it was advocating. And here, in contrast to Mahin, there is no second opinion in support of the judgment of the Michigan Supreme Court that clearly rests on an adequate and independent non-federal ground. Rather, a fourth justice in Bennis (Justice Griffin) joined in the result without writing any opinion explaining his vote for reversal. But an examination of the issues raised leaves no doubt that the Justice necessarily had to reject Tina Bennis' constitutional claim in order to join in the judgment of the Court and uphold the forfeiture of her property interest.[4] Therefore, it can be said with complete confidence that all four justices who comprised the majority relied on adequate and independent federal grounds in voting to reverse the Michigan Court of Appeals.

In further contrast to Mahin, the three dissenting justices here joined an opinion that actually approved of the plurality's rejection of the constitutional claim, at least to the extent it alleged a due process violation. Bennis, 447 Mich. at 752, n. 8 (dissenting opinion). This means that six out of seven justices expressly rejected Petitioner's constitutional claim, and the seventh necessarily rejected it in voting with the majority.

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[4]In order to uphold the forfeiture of John Bennis' interests in their car, Justice Griffin necessarily had to find, at a minimum, that the of misconduct of John Bennis was within the scope of the nuisance abatement statute. In order to uphold the forfeiture of Tina Bennis' interest, Justice Griffin had to additionally find that the statute did not require that the owner have knowledge of the illegal use before a forfeiture could take place. In order to uphold the forfeiture in the face of her constitutional challenge, Justice Griffin necessarily had to conclude that applying the Michigan nuisance abatement statute to forfeit her property interest did not run afoul of the Constitution.

A final reason why jurisdiction is present is that if the U.S. Supreme Court were to reject the constitutional "rule" expressly adopted by the plurality and the dissent, it would definitely alter the judgment of the Michigan Supreme Court. In that event, there would be at least six unequivocal votes in favor of invalidating the forfeiture as to Tina Bennis. In Mahin, by contrast, there was only a possibility that the Supreme Court's correction of the constitutional analysis employed by the two state Supreme Court justices would definitely change the judgment. Because there is no danger here that "the same judgment would be rendered by the state court after [the U.S. Supreme Court] corrected its views of federal laws," Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945), jurisdiction is present.

STATEMENT OF FACTS AND THE PROCEEDINGS BELOW

A. The Forfeiture of the Bennis Car and the Subsequent Appeals to the Michigan Court of Appeals and the Michigan Supreme Court

In early 1988, the Wayne County[5] Prosecutor's Office in Michigan announced a new policy of seizing the vehicles of persons arrested for soliciting prostitutes or for related crimes in certain Detroit-area neighborhoods. The Prosecutor's Office indicated that they would rely on an old[6] public nuisance abatement act enacted in Michigan as the statutory basis for the seizure of vehicles. Never before in its seventy-year history had the act been invoked to justify the confiscation of a vehicle used by one to visit a house of prostitution or to otherwise engage the services of a prostitute. Bennis, 47 Mich. at 760, 764 (Levin, J., dissenting).

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[5]Wayne County is the county in Michigan that includes within its boundaries the city of Detroit and a number of suburban communities.

[6]The statute is codified at M.C.L. § 600.3801 et seq. It was originally enacted in 1915, but the portion of the statute specifically relied upon by the Wayne County Prosecutor was added in 1925. Bennis, 447 Mich. at 759 (Levin, J., dissenting).

On the evening of October 3, 1988, almost immediately after the implementation of this new policy, Mr. Bennis was arrested[7] for gross indecency while he was in a car jointly owned by him and his wife (a 1977 Pontiac) that was parked on a Detroit street. The arresting officers testified that they approached Mr. Bennis's parked car, illuminated the inside with a flashlight, and observed a woman performing fellatio on Mr. Bennis in the front seat of the car. (R. 29, Trial Transcript, p. 67) Arrest records later showed that the woman had had prior arrests for, inter alia, accosting and soliciting. (Id. at 72-73)

The Bennis's car was seized and the Wayne County Prosecutor filed a civil action seeking, inter alia, a finding that the Bennis vehicle was an abatable public nuisance and that it was therefore subject to forfeiture. The nuisance abatement proceeding took place on November 2, 1988, just weeks after the complaint was filed by the Wayne County Prosecutor.[8] The respondent sought forfeiture of the Bennis' interest in their car by reason of the single instance of misconduct engaged in by Mr. Bennis in the automobile. The Bennis case was the very first case tried under the new Wayne County automobile seizure policy. (R. 29, Trial Transcript,

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[7]Subsequent to the nuisance abatement hearing, Mr. Bennis pled guilty to gross indecency, a crime under a Michigan statute. He was not charged with the crimes of soliciting and accosting or engaging services for the purpose of prostitution. Because the nuisance abatement proceedings preceded the criminal conviction, that conviction had no direct effect in the civil action.

[8]The nuisance abatement proceeding took place only 9 days after the answer to the complaint was filed by John and Tina Bennis. Under the applicable Michigan Court Rule, Rule 3.601, the plaintiff in a public nuisance action may notice the matter for hearing within 7 days of the filing of the answer. The trial judge denied a request by co-counsel for Petitioner and her husband for a 30-day adjournment to conduct discovery and prepare for trial, (R. 29, Trial Transcript, p. 23) even though they were willing to stipulate to continued detention of their car during that period. (Id. at 28-29) The trial judge also denied their request for a jury trial, saying: "By its very nature, it could not be, could not be a jury case. Go back to the Magna Carta." (Id. at 39)

p. 178)

At the nuisance abatement trial, petitioner Tina Bennis testified that she provided most of the money used to purchase the car, and that its source was savings from babysitting and similar jobs. (R. 29, Trial Transcript, p. 156) She also testified that she did not have any knowledge of her husband soliciting prostitutes. (Id. at 154) She further testified that, on the day he was arrested, she had no knowledge that he was going to do anything but came directly home from work. (Id.) Respondent Wayne County Prosecutor conceded on appeal that "the lower court transcript did not show knowledge on the part of Mrs. Bennis. . ." (Plaintiff-Appellant's Brief on Appeal to the Michigan Supreme Court, p. 29) All of this accords with the common sense notion that a wife would not have advance knowledge that her husband was planning to use their automobile in the manner the trial court found him to have used it.

The trial court ruled that the ownership interests of both John and Tina Bennis in the vehicle would be forfeited. The vehicle was ordered to be sold, with costs to the Wayne County Prosecutor and the Detroit Police Department to be deducted from the sale proceeds, and the balance to be paid to the State of Michigan. (R. 29, Trial Transcript, p. 194; R. 24, Order/Judgment of Court)

With respect to the specific interest of petitioner the trial judge made very few findings, and at one point suggested that the rights of an innocent owner would vary depending on the existence of "a different situation, different car, age of car, value, so forth." (R. 29, Trial Transcript, p. 193) The trial judge said that in other circumstances, "[he] would consider the concerns of Mrs. Bennis. . .." (Id.) He ruled that he would not do so in this case because the Bennis family had another vehicle, and because, after deducting court costs from the sale

proceeds, there would be "practically nothing left"[9] to compensate petitioner for her interest in the vehicle. (Id.)

The Michigan Court of Appeals reversed the trial court's order of forfeiture on statutory grounds in a 2 to 1 decision. State of Michigan ex rel. Wayne County Prosecuting Attorney v. Bennis, 504 N.W.2d 731 (Mich. Ct. App. 1993) The Michigan Court of Appeals held that proof of a single incident of "lewdness, assignation, or prostitution" was insufficient to establish a nuisance, and, moreover, that the County had failed to demonstrate that even a single such act had occurred. 504 N.W.2d at 733-35. The Court of Appeals also construed the nuisance abatement statute to require the County to prove knowledge on Tina Bennis' part that he used the vehicle for a purpose proscribed by the statute. Id. at 733. It held that "the record in this case does not support a finding that Mrs. Bennis knew the vehicle was being used for such purpose." Id. This alternative holding meant that, even assuming arguendo that forfeiture of the vehicle was otherwise proper, forfeiture of Tina Bennis' interest in the vehicle was not. Because the Michigan Court of Appeals decided the statutory issues in favor of John and Tina Bennis, it did not reach the constitutional issues raised on behalf of Tina Bennis.

The Michigan Supreme Court granted leave to appeal, and it reversed the judgment of the Michigan Court of Appeals in a 4 to 3 decision, thereby upholding the forfeiture. In so doing, the plurality opinion disagreed with the Court of Appeals ruling regarding the scope of

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[9]The order of forfeiture provides that all proceeds generated from the sale of the vehicle shall be used, inter alia, to reimburse the Wayne County Prosecutor for the "filing fee of this action" and "attorney costs," and the Detroit Police Department for "all police costs." The order further provided that "any remaining balance shall be paid to the general treasury of the State of Michigan." (R. 24, Order/Judgment) The trial court file contains no accounting of the amount and disposition of any proceeds realized from the sale of the vehicle.

the nuisance abatement statute. As for the constitutional claim made on behalf of Tina Bennis, that claim, as discussed above, was rejected not only by the plurality opinion, but also by the dissenting opinion, at least to the extent that the claim was grounded in the Due Process Clause. The Justice who provided the fourth vote for reversal necessarily must have rejected Tina Bennis' constitutional claim as well, though he did not write a separate opinion.[10]

B. The Michigan Supreme Court's Rejection of Petitioner's Constitutional Claim

The plurality opinion for reversal first concluded that an act of "lewdness, assignation, or prostitution" within the meaning of the nuisance abatement statute had occurred in the vehicle. 447 Mich. at 727. The opinion then construed the act to permit a forfeiture based upon a single act of lewdness in connection with an act of prostitution so long as the driver "entered into and thereby contributed to an existing condition that is a public nuisance." Id. at 734. These conclusions were dispositive of the issues regarding the forfeitability of Mr. Bennis' interest in the automobile.

Addressing the forfeiture of Tina Bennis' interest in the vehicle, the plurality opinion, construing what it said was "the plain language of the nuisance abatement statute," concluded that it "expressly obviates the requirement that an owner consent to or acquiesce in the illegal use of property."[11] 447 Mich. at 739. The plurality opinion did not purport to disturb the Court of Appeals holding that the record did not support a finding of knowledge on the part of Tina Bennis. The plurality assumed for the purposes of its analysis that she "did not have

[10]See footnote 4, supra.

[11]The nuisance abatement statute provides that, in any action brought under the act, "[p]roof of knowledge of the existence of the nuisance on the part of the defendants. . .is not required." M.C.L. 600.3815(2).

knowledge of or consent to the misuse of the Bennis vehicle, of which she was co-title owner." 447 Mich. at 740.[12] But because the opinion concluded that the statute expressly obviated the requirement to prove consent or acquiescence in the misuse of the property, forfeiture of Ms. Bennis' interest was deemed to be statutorily authorized. Id. at 737-39.

The plurality opinion then addressed whether the nuisance abatement statute or its application to Tina Bennis' interest in the automobile violated the U.S. Constitution, an issue that the Michigan Court of Appeals had not addressed. 447 Mich. at 739-743. Tina Bennis argued in the Michigan Supreme Court that, because she was an innocent owner of the automobile, the Due Process Clause of the Fifth and Fourteenth Amendments, as well as the Takings Clause of the Fifth Amendment (as applied to the states through the Fourteenth Amendment) precluded the forfeiture of her interest. (see Defendants-Appellee's Brief in the Michigan Supreme Court at 14, 15 & n. 11, 16)

The plurality opinion, relying on two decisions of the U.S. Supreme Court, rejected Tina Bennis' constitutional claim. The opinion cited to two decisions of the U.S. Supreme Court, Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) and a Prohibition-era case, Van Oster v. Kansas, 272 U.S. 465 (1926). It read Pearson and Van Oster as establishing that, under the Constitution, "the innocent owner's interest may be abated" as long as he or she "consented to the use [of the vehicle]," even if "it [was] used in a manner to which the owner did not consent." 447 Mich. at 742 n. 36 (emphasis in original) The plurality opinion concluded that, where a person's property is used by another in an unauthorized manner, the

[12]The dissent likewise stated that "Mrs. Bennis had no knowledge that her husband used the vehicle to engage in an act of gross decency." Bennis, 447 Mich. at 756 (Cavanagh, C.J., dissenting)

United States Supreme Court "indisputably" allows forfeiture of the property, unless "evidence [is] submitted that the property was stolen or used without the consent of the owner." Id. at 742. The dissenting opinion, while suggesting that this statement "sweeps too broadly," did agree in a footnote that it correctly stated what "due process" would permit. 447 Mich. at 752 n. 8 (Cavanagh, C.J., dissenting) Thus, even the dissenting justices would say that "forfeiture of an innocent owner's property" does not violate due process, "unless. . . the property was stolen or used without the consent of the owner."[13]

The plurality opinion stated that the facts in Bennis precluded any reliance by Tina Bennis on this sole constitutional exception to forfeiture. 447 Mich. at 741. The opinion therefore concluded that the application of the statute to deprive Tina Bennis of her interest in the car gave rise to "no constitutional violation." Id. at 742. It also concluded that "the [Michigan nuisance abatement] statute does not violate the constitution." Id. at 743.

WHY THIS COURT SHOULD GRANT CERTIORARI

A. The Innocent Owner Issue is "Serious" and The Michigan Statute Leaves No Means to Avoid the Constitutional Issue

There are a number of compelling reasons why this Court should grant certiorari in Bennis. First, the Court has recently described the kind of issue raised by this case as "serious" and the Michigan nuisance abatement statute offers no statutory basis for avoiding the constitutional question. The Court in Austin recently reiterated that forfeiture of a truly innocent person's property would raise "serious constitutional questions." Austin, 125 L. Ed. 2d at 502.

[13]Citing this Court's decision in Austin, the dissent did acknowledge that forfeitures "are subject to the excessive fines constitutional provision." 447 Mich. at 452-53 n. 8. But the dissent never elaborated on what relationship, if any, this Constitutional provision has to the taking of an innocent owner's property.

Justice Kennedy was equally emphatic about the seriousness of this constitutional issue in his concurring opinion in Austin:

> At some point, we may have to confront the constitutional question whether forfeiture is permitted when the owner has committed no wrong of any sort, intentional or negligent. That for me would raise a serious question.

Austin, 125 L. Ed. 2d at 510.

The Austin majority stated that the reason it was once again reserving the question "whether it would comport with due process to forfeit the property of a truly innocent owner" was that "the forfeiture provisions at issue here exempt 'innocent owners'." Id. at 502, n. 10. That reason for declining to decide the question is not present here, however. For the nuisance abatement statute used as the basis for forfeiture in Bennis not only fails to exempt "innocent owners." The statute actually includes "innocent owners" within its reach by expressly by "expressly obviat[ing] the requirement that an owner consent to or acquiesce in the illegal use of property." Bennis, 447 Mich. at 739; M.C.L. § 600.3815(2).

B. The Michigan Supreme Court's Rejection of Tina Bennis' Constitutional Challenge Was Erroneous

Petitioner Tina Bennis contends that the Bennis analysis is defective in two respects, each of which is addressed below.

1. The Constitutional Rule Adopted by the Plurality Opinion and the Dissent Regarding the Forfeiture of an Innocent Person's Property Contradicts Dicta in a 1974 Supreme Court Case that Has been Followed by Many State and Federal Courts

As mentioned above, the plurality purported to base it constitutional rule on two decisions of this Court, its 1926 decision in Van Oster and its 1974 decision in Pearson. Van Oster and Pearson involved situations in which an owner had consented to another person's use of his or

her property, who had in turn misused it, and the owner claimed he had neither participated in nor had knowledge of the misuse. In Pearson, it was conceded that the owner was uninvolved in and unaware of the wrongful activity of his lessee, Pearson, 416 U.S. at 668; in Van Oster, the Court assumed those facts in making its holding. The petitioner in Van Oster claimed that the taking of her automobile denied her "the due process of law guaranteed by the Fourteenth Amendment." 272 U.S. at 466. The petitioner in Pearson challenged the forfeiture statute as having authorized an unconstitutional taking of its property for government use without just compensation. 416 U.S. at 680.

The Court in Van Oster rejected petitioner's constitutional claim. In doing so, it appeared to hold that, so long as a property owner consented to another person's use of his property, that person used the property unlawfully, the property could be constitutionally forfeited even where the owner had no knowledge of or involvement in the wrongful use. 272 U.S. at 467-68. The only limitation on forfeiture that was even contemplated by the Van Oster Court would involve property that was "appropriated and used by the law breaker without the owner's consent." 272 U.S. at 467. The Van Oster Court reserved decision on that issue.

In Pearson, this Court rejected, inter alia, the argument that the forfeiture statute was unconstitutional in that it authorized the taking of an innocent party's property without just compensation.[14] But the Court also made statements in dicta that would place some limitations on the ability to forfeit property that was entrusted by an owner to another person, who in turn misused it without the knowledge or participation of the owner. That dicta indicated that "it

[14]The U.S. Supreme Court also rejected the constitutional claim that the lack of preseizure notice and a hearing deprived the owner of the yacht of due process. Pearson, 416 U.S. at 676-680.

would be difficult to reject the constitutional claim of an owner. . .who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property. . .." Pearson, 416 U.S. at 689.[15] Under the Pearson dicta, in contrast to the apparent holding in Van Oster, some type of negligence on the part of an owner who entrusts property to another would have to be present before a forfeiture could be constitutionally effected.

The Pearson dicta has been used by a number of federal and state courts to define the constitutional limits of forfeiture of the property of an owner who authorizes another to use it. See, e.g., State of New Jersey v. 1979 Pontiac Trans Am, 487 A.2d 722, 728 (N.J. 1985)[16]; United States v. One 1972 Chevrolet Blazer, 563 F.2d 1386, 1389 (9th Cir. 1977); United States

[15]The Puerto Rico statute in Pearson was modeled after 21 U.S.C. § 881(a). Pearson, 416 U.S. at 686-87, n. 25. Under that drug forfeiture statute, the government has the burden of establishing probable cause that the property is forfeitable because it was used improperly. Once probable cause is established, the burden shifts to the owner to prove either that no illegal use of the property occurred or to prove that he or she qualifies for the statutory "innocent owner" defense in section 881(a)(4). In 1973, that statutory defense was only available to persons who could prove that the illegal use was committed by somebody other than the owner who had unlawful possession of the property. Pearson, 416 U.S. at 686-87 n. 25 (quoting provisions of statute) This burden-shifting feature of drug forfeiture law may explain why the Pearson dicta placed the burden of proving a constitutional exemption from forfeiture on the owner. Under the Michigan nuisance abatement statute, by contrast, the burden of proving that an abatable nuisance occurred is always with the Prosecutor. The burden of proving any constitutionally required "culpability" on the part of an owner (including negligence) would therefore remain with the Prosecutor.

[16]In State of New Jersey v. 1979 Pontiac Trans Am, supra, the New Jersey Supreme Court, relying on the Pearson dicta, unanimously held that the Takings Clause did not permit the forfeiture of a person's property if he or she "did not consent to or know of the illegal use of their property and. . .did all that reasonably could be expected to prevent that use." 487 A.2d at 728. To avoid invalidation of the statute, the New Jersey Supreme Court construed the drug forfeiture statute to exclude that class of innocent owners. Id.

v. One (1) 1982 28' International Vessel, 741 F.2d 1319, 1322 (11th Cir. 1984); United States v. One Tintoretto Painting, 691 F.2d 603, 607 (2d Cir. 1982); United States v. One 1975 Pontiac Lemans, 621 F.2d 444, 448 (1st Cir. 1980). Moreover, statements by the Supreme Court in a more recent case, Austin v. United States, supra, reinforce the conclusion that, at least in cases where an owner entrusts his or her property to another, who in turn misuses it, this Court would hold that the Constitution requires some type of negligence on the part of the owner before a forfeiture can take place. In Austin, the Court, after citing a number of such cases decided by the Supreme Court, stated that in none of them did the Court approve a forfeiture "when the owner had done all that reasonably could be expected to prevent the unlawful use of his property." Austin, 125 L. Ed. 2d at 502. In the same vein, the Court suggested that the theory holding an owner "accountable for the wrongs of others to whom he entrusts his property" is "premised on the idea that the owner has been negligent." Id. at 502, 503.

The Michigan Supreme Court plurality opinion cited the dicta in Pearson as well as the holding in Van Oster, but, without even addressing the difference between the two approaches, ultimately adopted a constitutional rule closely resembling the Van Oster holding. That is, the plurality opinion embraced the rule that, unless property is stolen or taken from the owner without his consent, forfeiture of a person's property as a result of another person's misuse of it will not run afoul of the Constitution. The plurality adopted the rule that whenever property is entrusted to somebody else, who uses it wrongfully, forfeiture of the owner's property interest is constitutionally permissible, even if the owner is free of negligence. To that extent, the Bennis rule is plainly inconsistent with the Pearson dicta and with the numerous federal and state

cases that have used the dicta to establish constitutional limitations on forfeiture. At least one of those cases has specifically rejected a view of the constitutional limits on forfeiture like the one adopted in Bennis and has held that the Pearson dicta places additional limits on it. United States v. One Tintoretto Painting, 691 F.2d 603, 607 (2d Cir. 1982)

Besides being squarely at odds with the Pearson dicta and the cases that have applied the dicta, the constitutional rule articulated in Bennis is also difficult to reconcile with this Court's recent conclusion in Austin that past forfeitures approved by this Court have always been premised on the negligence of the owner in entrusting his property.

Petitioner likewise submits that, whatever this Court might have said in 1926, the Michigan Supreme Court's statement of the constitutional rule in Bennis would not command a majority of the Supreme Court today. Granting certiorari would enable the Supreme Court to once and for all resolve the tension between the Van Oster and other Prohibition-era holdings, on the one hand, and the dicta in Pearson, on the other hand, regarding the forfeiture of an innocent person's property. That conflict has important implications for federal and state jurisprudence and will only be deepened now that the Michigan Supreme Court has sided with the Van Oster view of the constitutional limits of forfeiture.

2. Because This is a Joint Ownership Case, Negligence in the Sense of the Pearson Dicta Cannot Arise Here

The Michigan Supreme Court's error in formulating the constitutional rule is compounded by the fact that, unlike Pearson and Van Oster, this is a case in which the property was jointly owned and the proscribed used was committed by one of the owners without the knowledge and participation of the other owner. There is real doubt that the Pearson dicta, which arose in the single owner scenario, could ever be used to justify a forfeiture of an innocent co-owner's

interest in property based upon the other co-owner's misuse of it.

As a co-owner of the Bennis vehicle, John Bennis had an independent right to use it and did not need to seek Tina's permission or authorization to do so. Because his use of the automobile did not depend on Tina Bennis' consent, and because she did not in any meaningful sense have the legal power to prevent his use, the issue of her negligence in giving consent to its use cannot even arise. In a joint owner situation, negligence of the kind that exists in the single owner situation simply cannot be present. (See Brief of Defendants-Appellees in the Michigan Supreme Court, p. 18, n. 12) As such, forfeiture of the innocent co-owner's interest in property misused by the other co-owner cannot be justified by showing that one party was negligent in permitting another to use the property. Cf. United States v. One 1977 Cherokee Jeep, 639 F.2d 212, 213 (5th Cir. 1981) (suggesting that the Pearson dicta may not apply in the situation "where one spouse is using community property for the proscribed use"); United States v. Parcel of Real Property Known as 6109 Grubb Road, 886 F.2d 618, 627 (3rd Cir. 1989) (stating that application of the Pearson dicta is "particularly daunting where. . .entireties property is involved") The rule in this context should therefore be that if the co-owner has no knowledge of the illegal use, forfeiture of his or her interest should be prohibited as being violative of both the constitutional guarantee of due process and the Fifth Amendment proscription against taking without compensation, as applied to the states through the Fourteenth Amendment. See Pearson, 416 U.S. at 694-695 (Douglas, J., dissenting)[17]

[17]Justice Stewart joined in that portion of Justice Douglas' dissent that would find the forfeiture of the Pearson Yacht Leasing Company's yacht to be a taking of property "for public use" under the Fifth Amendment, requiring payment of compensation to the innocent owner. Pearson, 416 U.S. at 690-91.

Even assuming arguendo that Tina Bennis had been the sole owner of the car, and had consented to her husband's use of the automobile, and the trial court had applied the Pearson dicta, it could not have ordered forfeiture in light of the other facts adduced at trial. It is uncontroverted that Tina Bennis had no knowledge of, and did not consent to, her husband's misuse of the automobile. Respondent Wayne County Prosecutor conceded in its brief to the Michigan Supreme Court that "the lower court transcript did not show knowledge on the part of Mrs. Bennis. . ." (Plaintiff-Appellant's Brief on Appeal, p. 29) There was no evidence that Mr. Bennis had engaged in any similar prior act, and Tina Bennis testified that she had no knowledge of any soliciting activities on his part. Thus, even if the Pearson dicta could properly be applied to this case, petitioner submits that, in light of her lack of knowledge, no reasonable trier of fact could conclude that she failed to do all that could reasonably be expected to prevent the misuse. Tina Bennis would stili be entitled to a reversal of the judgment against her, without remand on the negligence issue.

C. In Recent Years this Court Has Reversed the Long Trend of Judicial Deference to Forfeiture Statutes and Their Applications and Begun to Impose Significant Constitutional Restraints on Forfeiture

Another reason for granting certiorari is the increasing scrutiny to which the U.S. Supreme Court has subjected forfeiture statutes and their applications since 1993. In the last two years this Court, in apparent response to the increasing reliance by law enforcement on sweeping powers to confiscate property under civil forfeiture statutes, has begun to reign in those powers by subjecting them to constitutional restraint and (in the case of federal statutes) to narrowing constructions. These recent decisions of the Court have reversed a long judicial trend of deference to forfeiture statutes and their applications. In deciding these cases, the Supreme

Court has evinced a distrust of the government's exercise of broad powers to confiscate property through civil proceedings and a desire to protect innocent owners from property deprivations.

1. The Increased Reliance on Civil Forfeiture During the 1980's and Early 1990's and Judicial Deference Toward Forfeitures in that Era

The Supreme Court's 1974 decision in Calero-Toledo v. Pearson Yacht Leasing Co., supra, began a trend of judicial deference to forfeitures that was to last until 1993. As noted above, it was undisputed in that case that the yacht owner was uninvolved with and unaware of the illegal use of its yacht by its lessees. 416 U.S. at 668. There was no showing that the lessees had used the yacht for the purpose of "smuggling drugs" and apparently "only one marihuana cigarette was found on board." Pearson, 416 U.S. at 693 (Douglas, J., dissenting) By rejecting two constitutional challenges to the forfeiture under these facts, the Supreme Court clearly established a policy of judicial deference to civil property confiscations.[18]

In the years following the Court's decision in Pearson, and beginning most noticeably in the 1980's, forfeitures of property began to escalate dramatically. At the federal level, the dollar amount deposited in the Department of Justice Assets Forfeiture Fund increased from $27 million in fiscal year 1985 to $531 million in 1992. See U.S. Department of Justice, Asset Forfeiture Fact Sheet (1993). The states, too, began increasingly to rely on civil forfeiture as

[18]That judicial policy of deference to forfeiture statutes and their applications received additional impetus from the Supreme Court's decisions in United States v. Ward, 448 U.S 242 (1980) and United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984). The Court in those cases indicated that whether a particular sanction should be considered "criminal," so as to require application of certain constitutional safeguards, depended primarily on how Congress had labeled the sanction. The Court indicated that it would defer to that label unless it was contradicted by the "clearest proof." Ward, 448 U.S. at 248. Guided by this approach, the federal cases were virtually unanimous in concluding that the various constitutional protections that apply in criminal cases do not apply in civil forfeiture cases. See note 20, infra.

a law enforcement device and began applying forfeiture statutes in an extremely broad fashion.[19] The dramatic increase in property forfeitures that has occurred in the last decade or more is not surprising in light of the important procedural advantages they have offered over criminal proceedings[20] and in light of their revenue-generating potential.

2. The Supreme Court's Recent Imposition of Constitutional Limitations on Forfeitures, and its Concern that Property of Innocent Owners not be Forfeited

In two important cases decided in 1993, the Supreme Court, reversing the two-decade judicial trend against subjecting forfeiture to constitutional restraint, extended two separate constitutional protections to owners of property sought to be forfeited. In Austin v. United States, supra, the Supreme Court unanimously ruled that the Excessive Fines clause of the Eight Amendment applied to a drug-related forfeiture made pursuant to federal statute. And a few

[19]The use of the 70 year old nuisance statute to begin seizing automobiles in 1988 is by no means the only instance in Michigan involving reliance on broad interpretations of statutes to effect forfeitures. See, e.g., In re Forfeiture of 45649 Maben Rd., 434 N.W.2d 238, 240 (Mich. Ct. App. 1988), appeal denied, 442 N.W.2d 633 (1989) (accepting government's contention that house in which seven pounds of marijuana was found was forfeitable under provisions of statute permitting forfeiture of "container[s]" of controlled substances).

[20]In the 1970's and 1980's the federal courts repeatedly held that such constitutional protections as the "reasonable doubt" standard of proof, the Ex Post Facto Clause, the Sixth Amendment Confrontation Clause, the Double Jeopardy clause, and other protections accorded to defendants in criminal cases did not apply to property owners in civil forfeiture cases. See, e.g., United States v. $250,000 in U.S. Currency, 808 F.2d 895, 900 (1st Cir. 1987) (the "beyond a reasonable doubt" burden of proof standard); United States v. D.K.G. Appaloosas, 829 F.2d 532, 544-45 (5th Cir. 1987), cert. denied, 108 S. Ct. 1270 (1987) (Ex Post Facto Clause); United States v. Property Known as 6109 Grubb Road, 886 F.2d 618, 621 (3rd Cir. 1989) (Confrontation Clause); United States v. Cullen, 979 F.2d 992, 995 (4th Cir. 1992) (Double Jeopardy Clause). As a result of the U.S. Supreme Court decision in Austin and its decision last year in Department of Revenue of Montana v. Kurth Ranch, 511 U.S. ___, 128 L. Ed. 2d 767 (1994), some of those earlier holdings may no longer be defensible. See, e.g., United States v. $405,089.23 U.S. Currency, 33 F.3d 1210, 1219 (9th Cir. 1994) (relying on Austin to hold that civil forfeitures based on violation of federal drug laws constitute "punishment" for Double Jeopardy purposes)

months later, in United States v. Good, supra, the Court, distinguishing Pearson, supra, held that the Due Process Clause of the Fifth Amendment requires advance notice and a hearing prior to the seizure of real property to effect a civil forfeiture.

The Supreme Court's decisions in Austin and Good reflect its "distrust of the Government's aggressive use of broad civil forfeiture statutes," Good, 126 L. Ed. 2d at 521 (Thomas, J., concurring in part and dissenting), with its potential for arbitrary or excessive interference with property rights. Speaking for five justices, Justice Kennedy's opinion for the Court in Good described the case as illustrating the "essential principle" that "[i]ndividual freedom finds tangible expression in property rights." Good, 126 L. Ed. 2d at 508.[21] Justice Thomas, who dissented in part in Good because he believed the particular facts of the case did not establish a violation of due process, nevertheless characterized the Court's desire in Good to protect property rights as a "laudable goal." Id. at 522. Describing property rights as "central to our heritage," Justice Thomas emphasized that he was "sympathetic to [the Court's] focus on the protection of [those] rights. . .." Id. at 521.

The analysis employed by the Court in Austin and Good also reflects a specific concern that forfeiture statutes not be used to deprive an innocent person of his property. To be sure, Austin, as mentioned above, reserved ruling on the issue of whether the property of a truly innocent owner could be forfeited. But the Austin Court's conclusion that historically forfeiture has been "premised on the idea that the owner has been negligent" and has therefore "serve[d], at least in part, to punish the owner," 125 L. Ed. 2d at 503, certainly lends support to the

[21]This quotation was taken from Part II of the Court's opinion, which was joined by Justices Blackmun, Stevens, Souter and Ginsburg.

proposition that forfeiture of an innocent person's property would not pass constitutional muster, even if it may not be dispositive of that issue. See Austin, 125 L. Ed. 2d at 510 (Kennedy, J., concurring in part)[22]

In U.S. v. Good, decided a few months after Austin, the Court relied on the need to protect innocent owners from deprivation of their real property as one of the factors to justify its holding that due process required a pre-seizure notice and hearing. The Court concluded that an ex parte preseizure proceeding, in contrast to one that gives the owner notice and an opportunity to be heard, "affords little protection to the innocent owner." Good, 126 L. Ed. 2d at 504. That protection, the Court said, "is of particular importance here, where the Government has a direct pecuniary interest in the outcome of the proceeding." Id. at 504 & 504 n. 2.[23]

Finally, the Court's concern about forfeiture being visited upon innocent owners was also evident in United States v. 92 Buena Vista Avenue, Rumson, 507 U.S. ___, 122 L. Ed. 2d 469 (1993) The Supreme Court, in plurality and concurring opinions, rejected the construction of

[22]There is another sense in which the decision in Austin arguably presupposes that innocent owners have some constitutional protection from forfeiture. The Eighth Circuit decision under review in Austin had concluded that because forfeiture of the property of an innocent owner was constitutional, a fortiori the Eighth Amendment did not require proportionality review of forfeitures of property of culpable owners. Austin, 125 L. Ed. 2d at 495 (quoting from 964 F.2d at 817) The conclusion that the Eighth Amendment would not apply does seem to follow if the premise about the taking of an innocent owner's property were correct. Thus, by holding in Austin that the Eighth Amendment was applicable to civil forfeitures, the Supreme Court may impliedly have rejected the premise that the property of a truly innocent owner can be forfeited.

[23]In the case of forfeitures effected under the Michigan nuisance abatement statute, the government likewise has a "direct pecuniary interest in the outcome of the proceeding." M.C.L. § 600.3835 provides that the sale of personal property shall be "applied in payment of the costs of the action and abatement. . .." See note 9, supra.

the federal drug forfeiture statute urged by the government, and instead construed it in a way that significantly broadened the class of persons entitled to assert the innocent owner defense. 122 L. Ed. 2d at 484-85, 490-91 (plurality and concurring opinions).

The Bennis case presents the Court with another opportunity to subject broad (or broadly construed) property confiscation statutes to constitutional scrutiny and ensure that they are not used to deprive innocent owners of their property.

CONCLUSION

For all of the foregoing reasons, Tina Bennis' petition for writ of certiorari should be granted.

Respectfully submitted,

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No. 94-8729

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

TINA B. BENNIS, Petitioner

v.

STATE OF MICHIGAN ex rel. WAYNE COUNTY PROSECUTOR, Respondent

On Petition for a Writ of Certiorari to the
Michigan Supreme Court

PETITIONER'S APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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STATE OF MICHIGAN

THE THIRD JUDICIAL CIRCUIT FOR THE COUNTY OF WAYNE

THE PEOPLE OF THE STATE OF MICHIGAN,

vs. No. 88-824-379-CZ
MOTIONS and
TRIAL

JOHN CHARLES BENNIS and
TINA R. BENNIS,

Defendants.

THE PEOPLE OF THE STATE OF MICHIGAN,

vs. No. 88-824-455-CZ
MOTIONS

LEVOY WILSON, MARIE WILSON
and CHRYSLER CREDIT CORPORATION,

Defendants.

PROCEEDINGS had in the above-entitled matters before the HONORABLE MICHAEL J. TALBOT, Visiting Judge of the Third Judicial Circuit for the County of Wayne, State of Michigan, at 1011 City-County Building, Detroit, Michigan, on Wednesday, November 2, 1988.

APPEARANCES:

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Assistant Wayne County Prosecutor

Appearing on behalf of the People of the State of Michigan

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Attorney-at-Law

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PAUL DENENFELD
Attorney-at-Law

Appearing on behalf of the all Defendants

DAVID STEINGOLD
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Appearing on behalf of Defendants Bennis

KEVIN SUMMERS
Attorney-at-Law

Appearing on behalf of Defendant Chrysler Credit Corporation

is traditionally viewed as being broader than and including the term prostitution; that the term refers to the same general class of activities which are normally associated with houses of prostitution, and is designed to designate and prohibit sex acts of whatever nature which are performed for money.

Since Mr. Bennis asserted his Fifth Amendment right not to tell the Court what he was doing and whether money had been exchanged, I would submit that now we get into the drawing of an adverse inference from the refusal to testify which was mentioned earlier and I would ask the Court to draw that inference.

THE COURT: Thank you. These matters by their very nature are tried by the Courts and have been so for centuries in terms of questions of civil relief.

The Court is not unmindful that this is the first of what may be a series of trials. So it should be -- I don't know how to say this any more sharply or clearly, I'm confining myself to, A, the arguments made as a matter of law here in this case, and B, the factual presentation as made in this case.

Whether additional arguments or different legal arguments might be advanced in the cases to follow or next week or month, you take each case as presented and the same, too, with the factual situation. The next fact situation

may differ completely from this one.

So that when the Court speaks on this, in this matter today, it is for the matter before the Court, the case before us.

I try to stress that because I don't want to be misunderstood. I'm aware of the substantial public interest and various representatives of mediums that are here. That's number one. I'm speaking only as to this case. I'm not shutting the door to arguments that might be advanced in any other lawsuit.

Second, I think it's terribly important that everybody understand as a broadbrush stroke here that we are not attempting as a State or Michigan, as I read the statute, to try to take every car involved in every act of prostitution or lewdness or assignation any time any place and I think it's strongly misunderstood that that could and/or should happen or that's what the statute calls for.

It is just the reverse or rather a requirement of this particular statute. It requires the demonstration that not only did an act of lewdness or prostitution or assignation take place and the vehicle was involved specifically or could be some other mode of transportation -- here we're dealing with a particular car, and that coupled with it there must be a demonstration that it was a public nuisance encompassed here.

A singular act some time some place is not going to be involved and every time someoody is involved in terms of this city or this county, the car is to be taken or something of that nature.

Specifically as to the testimony that this Court has heard, we have heard testimony that on October 3rd, 8:10 p.m., Officer Anthony and his partner were in the vicinity; that there had been previous arrests of the young lady in question by officer Anthony. He's familiar with her and familiar with the particular area; that observing her conduct with waving her arms back and forth on Eight Mile, in the Eight Mile/Sherfield area, he sets up a surveillance.

Some 15 minutes goes by and then Mr. Bennis in his vehicle in question, a '78 Pontiac, comes by and they then drive down onto Sherfield, a side street, and get themselves off of Eight Mile.

When the officer then observing the Pontiac turning and racing north on Sherfield, which is a residential street, the vehicle stops. The lights go off. The officer waits till he loses sight of one of the two individuals in the car, the passenger, the female.

Without belaboring it, when the officer arrives, he sees a woman's head in the lap of Mr. Bennis. That ultimately Mr. Bennis's penis is noted to be exposed and his pants are down and that the young lady's mouth comes off of

Mr. Bennis's penis.

That by any definition is an act of fellatio and an act of fellatio certainly falls as far as this Court is concerned within the definitions provided, as long as we are satisfied that it's tied in with for money or for prostitution if you will.

Now, I think additional testimony that was presenced is and it should be appreciated, this was some 7:55 or so in the evening. The officer has indicated and we stress this, I have to as far as I'm concerned look at all of the collective witnesses who testified.

If you single out a witness and say, "Well, the case rises or falls on that witness," it's true. There won't be a case. I don't know there could be a case under the statute with a single witness. Can't imagine how you would do it.

It's a fabric and you look at that collective fabric and if you will, a quilt, and you put that garment together through the series of testimony of individuals who appear before the Court.

The officer himself said that given his tasks, he has made three arrests in this immediate area. One extrapolates from that testimony that he himself has assisted other officers in making arrests. It works in that fashion by its very nature.

Miss Worthy testifies she's an assistant prosecutor. It's simply to demonstrate that no one is immune. I presume that's the demonstration or that she was willing to come forward.

I would presume this would be some moment of discomfort for someone to take time off to come to Court and indicate when you have lived in a neighborhood since mere May, 1988, and this is only the early days of November, and in one of those months she wasn't here. She was at a seminar in some other part of the country.

Since that time, she has been accosted seven to eight times while attempting to simply take a bus to go to work in the morning at 6:15 or 7:00 clock and even on Sundays when you're attempting to go to work. That it's caused her to be forced to walk on side streets rather than a main public thoroughfare of this particular community of Detroit.

Miss Kirksey indicated a necessity has arisen for the creation of a CB patrol in the area of the Green Acres, a CB patrol beyond that or a civic association that one might normally find and that she has indicated that once again as part of this fabric that in the months of July, August and September, there were some 32 observations; that they're imperfect by their very nature.

It's subjective. I concede that and also only as

good is that which someone wishes to write down. She allowed they're not on duty at all times by any means but it's part of once again the over-all fabric to look to.

She, too, has been the victim of being accosted just this past fall on Woodward in the afternoon, to suggest a very limited geographic area that you look at, probably at best a couple of square miles or a mile square, even to the area she was defining when she was accosted.

It's apparently frustration all over because the next testimony we heard was that from Miss Knight. We've heard early morning. We've heard now Miss Knight coming home at about 1:30 in the evening. She lives on the street next to the one we're dealing with here today; that there are people sitting in front of her house in automobiles at 1:30 a.m. in a residential neighborhood.

She can't say with a degree of frequency. There have been occasions where cars have actually had people getting out -- women getting out and start walking back towards the bank parking lot at Eight Mile at that hour, 2:00 and 3:00 in the morning, 1:30 in the morning, consistent even with the testimony we heard here where a car is turned around and parked to the north.

There may be a rhythm or pattern on the part of those engaged, the ladies engaged in this kind of thing that they have a strategy or reason why they want to be able to

conceivably, if a CB'er comes up, they want to get back up on Eight Mile rather than stay off on the side streets.

I don't know, but she certainly indicated she's had the situation where there's this activity, this walking about and the problems she's had, that it goes back for a number of years back to 1982.

She speaks in terms of conclusions based on appearances, clothing or lack of same, hair, time of night, to assist her as I think it's within the purview of a layperson to suggest that she believes that these women are engaged in certain forms of conduct.

Mrs. Wilson, a mature woman, volunteered that her age was 59, who also lives on Gardendale, just the next block over, she has been a resident there since 1961.

At all times, day and night, every day, 365 days of the year, that she has had to suffer, put up with the acts and frustrations of those engaging in some forms of activity in front of her home, her neighbors, that you cannot even walk along Eight Mile Road now; that even when she wants to go for a little walk in the morning, she has to have her husband trailing behind her and even there, to their credit, you had police officers who expressed concern as to her welfare.

The heightened tensions that must be existing for all of that to take place. It's rather extraordinary. It's

right off a residential neignborhood.

She's indicated cnat sne nas observed tnese young women walking back and forth, never been on a bus but always at the bus stops.

She also describes the skimpy dressing and clothing and so forth. She observed the venicles take the girls. The girls get in. Some signal. Some don't. Almost consistently and it stands to reason, stands to reason, that one doesn't engage in sexual activity for the most part while you're sitting there on Eight Mile Road. It's a little bit awkward and not the least bit dangerous.

One could use a little play on words about the risk of being rear ended or something during the course of other types of activity but it stands to reason that one is going to go off to the side streets to avoid the risks of either arrest and/or danger to themselves.

Thus, you're going to go right smack into those side streets, those neighborhoods, into a residential area of the city and I have no doubt as Mrs. Wilson described it that this is taking place all times from her testimony and from the collective testimony of the others.

She's indicated that she's of course not come upon an actual act. I don't think that the statute required that but she certainly had occasions when she's seen two heads and then only one head above the dashboard or windows and

then off one goes back to Eight Mile Road.

She's indicated that it's two to three times a week that she had been subjected to this kind of observation.

Mr. Russell, who by the very nature of his work would suggest a chap trained in both analysis and observation, has lived on Gardendale for some 20 years. He says this is a growing, growing, growing problem.

He has on two occasions -- how much do you need? Do you need two witnesses, three, five, ten? On two occasions where he's not out looking for problems and/or activity but attempting to live within his community, he has had occasion to come upon individuals at the alley south of Eight Mile and Gardendale and another time where they're outside of the vehicle in the corner behind that vacant building, both acts of fellatio.

He has been solicited by prostitutes some half a dozen times and along Eight Mile Road a month ago, on one or two occasions during the course of the summer, he's engaged in perhaps a wise and not-so-wise suggestion that some of the johns move on only to be subjected to verbal abuse and obscenities.

He has seen an increase in this activity and he has now reached the point where if he is like any other individual I know, he has a home in which some 25 percent of

his income probably goes towards the maintenance and upkeep of that home. That's the average in this country.

He now has to worry about his eight year old, five year old, those youngsters. Now can they go out and play like most of us used to do as kids or do you have to worry about your youngster then coming upon an act of prostitution, observing fellatio, cunnilingus or whatever it may be, but stay with just that before us today.

Every time you send your youngster out to play on the streets, he has already had that problem, he said, personally with the vacant lot that is just six doors north of him.

Mr. Parham then tells us that he recognizes Mr. Bennis. One of the reasons for the Court's ruling at the show cause proceeding was the risk of this type of vehicle and this type of activity continuing and that it seems to have been borne out.

Not that this vehicle was used again because I didn't allow it to be returned till such time as trial, but it is borne out to the extent that sure enough, there's a pattern if you believe Mr. Parham and I do, of conduct such that there would be substantial reason to think after you have been chased off even this summer from a neighborhood by a security guard that you elect to come right back in to that general neighborhood of some mile and mile and-a-half

away.

If you're prepared to do that, I think my judgment at the show cause proceeding has been affirmed in terms of at least holding that vehicle till a speedy trial could be had.

Some of the things that I don't fully understand, I was a little surprised. I thought frankly that this was the only vehicle that the defendants in this case had and I can well appreciate -- this is merely observation, that being the only car, that there was this true need to try to get their vehicle back in some fashion.

Now I learn there are two vehicles. This was a second car that was obtained this September for some $600.00. Well, so be it.

I don't know in every case what I'm going to do with co-title owners, holders of vehicles. I'm going to have to make a case by case determination.

I think the case law may allow for it but in terms of this Court's equity and authority, I'm going to exercise my discretion in each singular case and the remedy that I may employ depending upon the circumstances will be one of if I find the public nuisance and order the abatement, I may order after costs are deducted and vehicle sold, I may order one-half of the balance to go to what is referred to as the innocent co-title holder.

That will be done on a case by case basis depending upon the evidence and proofs submitted.

In the instance before us here -- well, see, the problem I've got is that the value is such that even under equity -- well, we'll see. I just don't know that it's going to be anything here to be concerned with. If it suggests that this Court is reaching a conclusion, yes, you may so conclude.

I have heard suggestions here by the defense counsel, Mr. Bennis's counsel, that what we should do is block off some of the streets.

We have already called upon folks in a given community, many sub-sections of this city and other communities to put bars on their windows, to have alarms on their cars, to walk in absolute fear any day or night because of their neighborhood, and the quality and condition of their neighborhood and now, let's kind of box you in or kind of build up some walls some more. Now, you can't use your streets.

That smacks of an insensitivity that I don't really think was intended.

The criminal law is designed to address the individual before the Court. Whereas the civil remedy available here is designed to address a broader problem of a public nuisance and they are truly distinguishable in that

only this civil remedy can in some instances address the problem.

One or a couple of different concerns raised, one is how can you tell a prostitute? I think it's somewhat specious to suggest that but for someone who has a card or something to hand out saying, "I'm a prostitute," that one can't draw reasonable and rational conclusions.

I suggest that the standard was set in a slightly different factual situation by the Supreme Court Justice Potter Stewart of, "I know it when I see it."

He felt that he could define obscenity and I suggest, too, that so can any layperson define someone who is actively engaging in the business of accosting and soliciting on their street corner.

When I hear the collective conduct, unless Mr. Bennis of course who did elect to take his Fifth Amendment right and I won't draw an inference against that, unless and til such time as one would be in a position to argue that, "I was with some family member" or something of that nature, it's not uncommon to have based on the conduct we have heard along that strip, I think, by a preponderance of the evidence, I can be perfectly comfortable this was a young woman engaged in business to perform an act of gross indecency and lewdness as was Mr. Bennis.

The law also it should be understood is concerning

itself here with this geographic area before us and I've heard it argued, is this too strong a remedy, this civil remedy?

I don't know that that argument would be advanced if we were -- I don't know -- at Kercheval and Moran and the type of conduct I've heard continued day in and day out, night after night and day after day, 365 days a year, or if it were along Northwestern Highway in Oakland, I wonder what hue and cry there would be.

But what we have here, the individual in this case, an individual from another community, Royal Oak, comes in to show just blatant insensitivity.

You look about you and you see people's homes where they raise their children, where their families are living, where they are having probably most of their money in this world going towards the purchase and maintenance of their home, for one's personal pleasure one contributes to what is clearly established in this case to be a public nuisance in that community, the Pembroke, Livernois, Eight Mile, Woodward community.

That sort of insensitivity is such that when one says in return, you run the risk, sir, by engaging in that sort of conduct and contributing to the public nuisance of that, you run the risk of your automobile, I find that a perfectly reasonable balance to the rights of the citizens

of that community to be free of this kind of obscene conduct within their neighborhood.

It should also be noted and I heard reference to those who engaged in prostitution. I'm sure that somewhere along the line there's been someone from the organization that Mr. McGuire is, and this is not to be denigrating, who has along the line defended in some fashion those who are engaged in prostitution.

Now suggesting a remedy is too harsh or we're insensitive, that these women are going off and no one ever does anything about the johns, closed quote.

It's true. I suggest that for men, especially particularly for men, men in the law, men in Courts, trial Courts, Appellate Courts, we are insensitive because we conceivably place ourselves in a but-for position or there but for the grace of God or whatever, some sort of mentality.

If you then say as to what remedy should we use and how should we try to solve this community problem, this public nuisance, well, I suggest to you that we have got jails. In point of fact, we don't.

Well, I suggest to you that put the prostitutes in jail and someone says, well, off she went for 60 or 90 days. No one sheds a tear, but let the john run the risk of the loss of some of his property, and everybody cries, "How

harsh, how severe a remedy."

But for the john, the young lady hasn't got any business. It's classic chauvinism and sexism where we are so concerned about some mere property rights or mere property loss, not rights, rights we should be concerned about but mere property loss versus the loss of one's freedom, if you were the prostitute, the woman, in terms of the balancing of the equities.

I find this law to be appropriate, as an appropriate remedy where the facts bear it out and the facts bore it out here, that we have a public nuisance.

I believe the remedies are such as I said that in a given situation, I would consider the concerns of Mrs. Bennis but I'm cognizant, A, there's another automobile. So, they are not without transportation.

B, I'm cognizant of the fact that there's no costs or there's practically nothing left minus costs in a situation such as this.

In a given case, I might look at a different situation, different car, age of car, value, so forth.

In the situation before me, there's really nothing to be able to be done here but fortunately there's another automobile.

If Mr. Bennis has a speck of decency left to him, let him worry about his transportation and give Mrs. Bennis

her automobile.

The venicle is deemed to be a public nuisance. It shall be abated. It shall be sold. Costs to be deducted and the balance of the monies to the State of Michigan.

We'll take 15 minutes and start the other case.

MR. BEST: Thank you, your honor.

(End Bennis trial)

***

BEST AVAILABLE COPY

CERTIFICATE

I, Lois Billiter, Certified Stenographic Reporter 0134, do hereby certify that the foregoing trial in the matter of the People of the State of Michigan versus John Charles Bennis and Tina B. Bennis, case number 88-824-379-CZ, and motions heard in the matter of the People of the State of Michigan versus Levoy Wilson, Marie Wilson and Chrysler Credit Corporation on Wednesday, November 2, 1988, at the place aforesaid, held before the HONORABLE MICHAEL J. TALBOT, Visiting Judge of the Third Judicial Circuit Court for the County of Wayne, State of Michigan, was reported by me by means of Computer-Assisted Transcription and is a true and correct transcription of my stenotype notes.

Lois Billiter

Lois Billiter, CSR 0134, RPR

Dated: Dec 22, 1988

Detroit, Michigan

#10pd

FILED IN MY OFFICE NOV 16 1988 BY

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

STATE OF MICHIGAN EX REL JOHN D. O'HAIR,
PROSECUTING ATTORNEY FOR WAYNE COUNTY,
Plaintiff

v 88-824-379 CZ

JOHN CHARLES BENNIS and TINA B. BENNIS,
Defendants/

ORDER/JUDGEMENT

At a session of said Court held in the City County Building on Nov 16 1988 the Honorable Michael J. Talbot, presiding,

This matter came before this Court pursuant to a Complaint for Abatement of a public nuisance. At the trial of this matter conducted on 2 November 1988, testimony was received from witnesses of the Plaintiff and from TINA B. BENNIS. Based on the testimony presented, in light of the arguments of counsel, and with a full understanding of the statutes and court rules and case law precedents involved in this area,

IT IS HEREBY ORDERED THAT the 1977 Pontiac, jointly owned by JOHN CHARLES BENNIS and TINA B. BENNIS, for those reasons fully stated by this Court on the record made on the trial date, is a public nuisance and that said vehicle shall be abated as provided by the controlling statute.

IT IS FURTHER ORDERED THAT the proceeds derived from the sale of said vehicle pursuant to statute shall be disposed of in the following order of priority: the filing fee of this action shall be returned to the Office of the Wayne County Prosecutor, all police costs shall be paid to the Detroit Police Department, all attorney costs shall be paid to the Office of the Wayne County Prosecutor, any remaining balance shall be paid to the general treasury of the State of Michigan.

Michael J. Talbot

Hon. Michael J. Talbot

Approved As To Form:

A. George Best II
Assistant Prosecuting Attorney

Paul J. Denenfeld
Counsel for Defendants

Order entered pursuant to 7 day rule.

[4, 5] We reject plaintiff's argument that the period of limitation had been tolled under M.C.L. § 600.5851; M.S.A. § 27A.5851 because he had been suffering from mental derangement. None of the documentary evidence submitted by plaintiffs to the circuit court show any controversy with respect to whether plaintiff was deranged at the time his claim accrued. *Makarow v. Volkswagen of America, Inc.*, 157 Mich.App. 401, 407, 403 N.W.2d 563 (1987). Although the circuit court erred in finding that plaintiff was not mentally deranged because he was able to work, see *Davidson v. Baker-Vander Veen Construction Co.*, 35 Mich.App. 293, 302-303, 192 N.W.2d 312 (1971), the evidence presents no genuine issue of material fact regarding plaintiff's sanity at the time his claim accrued. See also *Hooper v. Hill Lewis*, 191 Mich.App. 312, 316, 477 N.W.2d 114 (1991). Thus, the circuit court did not err in granting defendant summary disposition.

Affirmed.

200 Mich.App. 670

STATE of Michigan ex rel. WAYNE COUNTY PROSECUTING ATTORNEY, Plaintiff-Appellee,

v.

John Charles BENNIS and Tina B. Bennis, Defendants-Appellants.

Docket No. 132568.

Court of Appeals of Michigan.

Submitted Dec. 17, 1992, at Detroit.

Decided July 19, 1993, at 9:45 a.m.

Released for Publication Sept. 23, 1993.

In action to abate as a nuisance an automobile jointly owned by the defendants, the Circuit Court, Wayne County, Michael J. Talbot, J., entered an order of abatement, and the defendants appealed. The Court of Appeals, Murphy, J., held that: (1) prosecutor was required to prove that defendants knew their vehicle was being used for lewdness, assignation, prostitution or gambling before vehicle could be ordered abated as nuisance; (2) single alleged incident of lewdness, assignation or prostitution in defendants' vehicle was insufficient to demonstrate that vehicle was nuisance subject to abatement; and (3) prosecution failed to demonstrate that defendant engaged in act of "lewdness," "assignation," or "prostitution" in car.

Reversed.

Jansen, P.J., filed dissenting opinion.

1. Nuisance ⇐65

Prosecutor was required to prove that defendants knew their vehicle was being used for lewdness, assignation, prostitution or gambling before vehicle could be ordered abated as nuisance. M.C.L.A. §§ 600.3801, 600.3815(2).

2. Nuisance ⇐84

Record would not support finding that defendant wife had knowledge that defendant husband was using their jointly owned vehicle for purposes of lewdness, assignation or prostitution, precluding abatement of vehicle as nuisance. M.C.L.A. §§ 600.3801, 600.3815(2).

3. Nuisance ⇐65

Single alleged incident of lewdness, assignation or prostitution in defendants' vehicle was insufficient to demonstrate that vehicle was "nuisance" subject to abatement; circumstances did not permit reasonable inference that conduct was habitual, notwithstanding lengthy discussion of reputation and record of woman found in car with defendant husband, or testimony that husband had been seen on multiple occasions driving in area and talking to women. M.C.L.A. § 600.3801.

See publication Words and Phrases for other judicial constructions and definitions.

4. Nuisance ⇐65

Statute providing for abatement as nuisance of property where lewdness, assignation or prostitution takes place was enacted to subject houses of prostitution to abatement as nuisances, and was not intended to regulate morality of individuals, or to prevent incidents of immorality in otherwise respectable establishments. M.C.L.A. § 600.3801.

5. Nuisance ⇐65

Prosecution failed to demonstrate that defendant engaged in act of "lewdness," "assignation," or "prostitution" in car, so as to support abatement of car as nuisance, absent proof that sexual activity in which defendant was engaged with woman previously arrested for prostitution was in exchange for money, notwithstanding that defendant's conduct may have been lewd or an assignation in general sense, and notwithstanding that his conduct could be equated with gross indecency, and was therefore arguably disorderly. M.C.L.A. § 600.3801.

See publication Words and Phrases for other judicial constructions and definitions.

6. Nuisance ⇐65

While "lewdness" may be defined more broadly in common sense of word, in statute providing for abatement as nuisance of property in which lewdness, assignation or prostitution takes place, "lewdness" is confined to acts of prostitution. M.C.L.A. § 600.3801.

Frank J. Kelley, Atty. Gen., Thomas L. Casey, Sol. Gen., John E. O'Hair, Pros. Atty., Andrea Solak, Chief, Sp. Operations, and Larry L. Roberts, Asst. Pros. Atty., for plaintiff-appellee.

ACLU Fund of Michigan by Paul J. Denenfeld, Detroit, for defendants-appellants.

Before JANSEN, P.J., and MURPHY and MARILYN J. KELLY, JJ.

MURPHY, Judge.

Defendants appeal from a judgment of the circuit court declaring their 1977 Pontiac automobile to be a nuisance and abating the nuisance, thereby terminating their interest in the automobile. We reverse.

Defendant John Bennis was convicted of gross indecency, M.C.L. § 750.338b; M.S.A. § 28.570(2), following an incident in which police officers observed Mr. Bennis engaging in a sexual act with a woman in defendants' 1977 Pontiac. Plaintiff then filed this action, alleging that Mr. Bennis used defendants' car for the purpose of lewdness, assignation, or prostitution, in violation of M.C.L. § 600.3801; M.S.A. § 27A.3801, and that the car was therefore a nuisance subject to abatement pursuant to M.C.L. § 600.3825; M.S.A. § 27A.3825. The circuit court declared the car to be a nuisance and abated the nuisance, terminating defendants' interest in the automobile.

[1] Defendants first contend that they were entitled to summary disposition pursuant to M.C.R. § 2.116(C)(8) because plaintiff failed to demonstrate that defendant Tina Bennis had knowledge that her husband, defendant John Bennis, was using the vehicle, which they jointly owned, for purposes of lewdness, assignation, or prostitution. We agree that the prosecution was obligated to demonstrate that defendants knew of the use of the vehicle as a nuisance before the nuisance could be ordered abated.

The statutes relating to public nuisance provide for declaring certain property to be a nuisance where "lewdness, assignation or prostitution or gambling" takes place on that property. M.C.L. § 600.3801; M.S.A. § 27A.3801 provides, in pertinent part:

> Any building, vehicle, boat, aircraft, or place used for the purpose of lewdness, assignation or prostitution or gambling, or used by, or kept for the use of prostitutes or other disorderly persons, ... is declared a nuisance, ... and all ... nuisances shall be enjoined and abated as provided in this act and as provided in the court rules. Any person or his or her servant, agent, or employee who owns, leases, conducts, or maintains any building, vehicle, or place used for any of the

purposes or acts set forth in this section is guilty of a nuisance.

M.C.L. § 600.3805; M.S.A. § 27A.3805 authorizes prosecuting attorneys, among others, to bring an action for equitable relief to abate a nuisance. M.C.L. § 600.3825; M.S.A. § 27A.3825 provides for the issuance of an order of abatement and sale of property found to be a nuisance, including vehicles.

M.C.L. § 600.3815(2); M.S.A. § 27A.3815(2) provides that "proof of knowledge of the existence of the nuisance on the part of the defendants or any of them, is not required." The Michigan Supreme Court, however, has held that, regardless of this statutory language, proof of knowledge is required for abatement. In *People v. Schoonmaker*, 241 Mich. 177, 181, 216 N.W. 456 (1927), our Supreme Court stated:

> Defendants did not maintain a nuisance unless they permitted such illegal use of the premises; that is, consented to it or acquiesced, and whether they did so was a question of fact, not established by efforts to prevent misuse of the premises but only by some evidence disclosing permissive use....
>
> ... That transgressions may happen is possible, but remain offenses of the wrongdoer unless tolerated by the occupant to the extent of permissive use of the premises for such purpose or indifference thereto. The statute does not deprive one person of the use of his property by reason of the illegal acts of another, unless the owner's use bears a participating relation to the violation.

In subsequent decisions, the Supreme Court has held that the statute obviates the need for proof of knowledge, and apparently has ignored *Schoonmaker*, as noted by this Court in *State ex rel. Oakland Co. Prosecutor v. Motorama Motel Corp.*, 105 Mich.App. 224, 228, 307 N.W.2d 349 (1981). See *People ex rel. Wayne Prosecuting Attorney v. Bitonti*, 306 Mich. 115, 119, 10 N.W.2d 329 (plurality) (1943); *People ex rel. Wayne Prosecuting Attorney v. Tate*, 306 Mich. 667, 669, 11 N.W.2d 282 (1943); *State ex rel. Attorney General v. Robinson*, 250 Mich. 99, 103, 229 N.W. 403 (1930). The *Schoonmaker* view has recently received support, however, in *State ex rel. Wayne Co. Prosecuting Attorney v. Levenburg*, 406 Mich. 455, 462, n. 1, 280 N.W.2d 810 (1979), in which our Supreme Court stated in dicta: "However, we acknowledge that a judgment for abatement in a prosecution of this nature cannot be rendered without a finding of knowledge of the accosting and soliciting on the part of the owners or operators of the place found to be a nuisance and their acquiescence in those activities."

[2] Considering that *Schoonmaker* has never been expressly overruled, and in light of the comment in *Levenburg*, we follow the *Schoonmaker* analysis, as this Court did in *Motorama*, *supra*, and *State ex rel. Wayne Prosecuting Attorney v. Weitzman*, 21 Mich.App. 705, 710–711, 176 N.W.2d 463 (1970). We therefore hold that the prosecutor was required to prove that defendants knew that their vehicle was being used for a purpose set forth in M.C.L. § 600.3801; M.S.A. § 27A.3801. We further hold that the record in this case does not support a finding that Mrs. Bennis knew that the vehicle was being used for such purpose.

[3] Defendants next contend that the claimed nuisance could not be abated because only one incident of lewdness, assignation, or prostitution was alleged before the trial court, and that this is insufficient to demonstrate a nuisance. We agree. In *Motorama*, the plaintiff alleged that, on one occasion, a police officer was accosted and solicited by an unknown female at a bar and that she then took the officer across the street to the defendant's hotel. The trial court granted the defendant summary disposition, holding in part that the one instance of lewdness and assignation alleged by the plaintiff was insufficient to support a claim of nuisance. This Court affirmed, holding that a single alleged incident is insufficient to create a nuisance unless circumstances are such that a reasonable inference can be drawn that the conduct was habitual. *Id.*, 105 Mich.App. at 229–230, 307 N.W.2d 349; see also *Bitonti*, *supra*, 306 Mich. at 119–120, 10 N.W.2d 329 (Justice Chandler). The facts in *Motorama* were insufficient to permit such an inference, even though the affidavit of the police officer in question stated that there had been numerous arrests of females in that area for solicitation at the bar across from the defendant's hotel. *Id.*, 105 Mich.App. at 226, 229–230, 307 N.W.2d 349.

[4] The *Motorama* approach best effectuates the purpose of the statute. The abatement statute was enacted to subject houses of prostitution to abatement as nuisances. *State ex rel. Wayne Co. Prosecutor v. Diversified Theatrical Corp.*, 396 Mich. 244, 246–250, 240 N.W.2d 460 (1976). The purpose of the act has also been described as eliminating the use of property in connection with gambling, prostitution, and the illicit sale of liquor. *People ex rel. Wayne Prosecuting Attorney v. Sill*, 310 Mich. 570, 575, 17 N.W.2d 756 (1945); *State ex rel. Oakland Prosecuting Attorney v. Ginell*, 159 Mich.App. 679, 681–682, 407 N.W.2d 59 (1987). The statute is not intended to regulate the morality of individuals, or to prevent incidents of immorality in, for example, hotels that are otherwise respectable establishments. See *Diversified Theatrical Corp.*, *supra*, 396 Mich. at 247, 240 N.W.2d 460.

As in *Motorama*, we hold that a single incident is insufficient to establish a nuisance. Further, the circumstances of this case do not permit a reasonable inference that the conduct was habitual. In this case, the prosecution has alleged only a single incident to support the contention that defendants' car was a nuisance. While the prosecution discusses at length the reputation and record of Kathy Palarchio, the woman found in the car with Mr. Bennis, this does not establish that defendants' car was used on more than that occasion for lewdness, assignation, or prostitution. Similarly, testimony was presented that Mr. Bennis was seen on more than one occasion driving in that area and talking to women. Not only does this observed conduct not prove that defendant was involved in lewdness, assignation, or prostitution, there was no evidence to establish that this conduct, if it occurred, took place in the vehicle in question. In fact, defendants allegedly purchased the car only three weeks before the incident that gave rise to this action.

The dissent in this case states that the mobile nature of a vehicle, as compared to real property, justifies finding the vehicle to be a nuisance upon proof of only one incident of prohibited conduct. The dissent reasons that to require proof that the vehicle was used on more than one occasion for a purpose proscribed by the statute would thwart the purpose of the public nuisance statute. While the prohibited conduct would indeed have to be observed on more than one occasion, that is the very nature of a nuisance. *Motorama*, *supra*, 105 Mich.App. at 229–230, 307 N.W.2d 349. In fact, if conduct happens so rarely that authorities investigating the situation are unable to observe a recurrence of the conduct, we would hesitate to find a nuisance. Just as one incident of prostitution does not create a brothel out of a family hotel, neither does one isolated incident of prohibited conduct in a vehicle necessarily make the vehicle a nuisance.

[5] Defendants further contend that the prosecution failed to demonstrate that an act of lewdness, assignation, or prostitution occurred in the car and that the abatement provisions are therefore inapplicable. We agree. After the incident in question, Mr. Bennis apparently was charged with one count of gross indecency, M.C.L. § 750.338b; M.S.A. § 28.570(2).[1] The record indicates that Mr. Bennis was found in the car in an area apparently known for prostitution and was engaged in
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Reversed.

MARILYN J. KELLY,

JANSEN, Presiding Ju

I respectfully dissent.
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1. The complaint alleges that Mr. Bennis was charged with "indecent and immoral conduct." The complaint further alleges that "the observed conduct is a violation of MCLA 750.449a, engaging the services of a prostitute and MCLA 750.338b, gross indecency between male and female." The prosecution agrees in its brief on appeal, however, that defendant John Bennis was charged only with gross indecency, and further admits that there is no evidence that Mr. Bennis paid or intended to pay Ms. Palarchio.

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tion and was engaged in sexual activity with a woman previously arrested for prostitution. Defendant was only charged with gross indecency, however, presumably because there was no proof that the activities in which Mr. Bennis and Ms. Palarchio were engaged involved the payment of money.

[6] Our Supreme Court in *Levenburg* noted that while assignation is generally defined as an appointment for a meeting, especially between lovers, the term as used in the abatement act is limited to the making of an appointment for purposes of prostitution. *Levenburg, supra*, 406 Mich. at 465–466, 280 N.W.2d 810. Similarly, while lewdness may be defined more broadly in the common sense of the word, in the abatement act the term is confined to acts of prostitution. See *Diversified Theatrical Corp., supra*, 396 Mich. at 246–250, 240 N.W.2d 460. This construction of the terms is sensible, considering that the purpose of the statute is to eliminate repeated prostitution in a specific location. Thus, while Mr. Bennis' conduct in his car may have been lewd or may have been an assignation in a general sense, there is no demonstration that the conduct was that which is prohibited by the statute, absent proof that the sexual activity was in exchange for money.[2]

Reversed.

MARILYN J. KELLY, J., concurred.

JANSEN, Presiding Judge (dissenting).

I respectfully dissent. I would affirm the November 16, 1988, judgment entered by the Wayne Circuit Court declaring defendants' 1977 Pontiac automobile to be a nuisance and terminating their interest in the automobile.

Defendants contend that the trial court erred in denying their motion for summary disposition brought pursuant to M.C.R. § 2.116(C)(8). Specifically, defendants argue that plaintiff's complaint failed to allege more than one isolated instance of use of the 1977 automobile for purposes of lewdness, assignation, or prostitution and failed to allege knowledge of, consent to, or acquiescence in the alleged nuisance by Tina Bennis. I disagree.

A motion for summary disposition based on a failure to state a claim upon which relief can be granted is to be tested by reference to the pleadings alone, and all well-pleaded material allegations must be taken as true. *State ex rel. Oakland Co. Prosecutor v. Motorama Motel Corp.*, 105 Mich.App. 224, 226, 307 N.W.2d 349 (1981). The standard is whether the plaintiff's claims are so clearly unenforceable as a matter of law that no factual development could possibly justify a right to recovery. *Id.*

Defendants maintain that plaintiff's complaint was insufficient because it failed to allege that Tina Bennis had knowledge of, consented to, or acquiesced in the use of the automobile by her husband to create a nuisance. The majority held that "the prosecution was obligated to *demonstrate* that defendants knew of the use of the vehicle as a nuisance before the nuisance could be ordered abated." (Emphasis added.) I disagree.

It is not disputed that the title to the 1977 automobile indicated that Tina Bennis and John Bennis were its owners. M.C.L. § 600.3815(2); M.S.A. § 27A.3815(2) specifically and unambiguously provides that "[p]roof of knowledge of the existence of the nuisance on the part of the defendants or any of them, is not required." The statute expressly obviates the necessity of proof of knowledge of the existence of the nuisance on the part of defendants. *People ex rel. Wayne Prosecuting Attorney v. Bitonti*, 306 Mich. 115, 119, 121, 10 N.W.2d 329 (1943); *State ex rel. Attorney General v. Robinson*, 250 Mich. 99, 103, 229 N.W. 403 (1930). But see *People v. Schoonmaker*, 241 Mich. 177, 216 N.W. 456 (1927); *State ex rel. Wayne Prosecuting Attorney v. Weitzman*, 21 Mich.App. 705, 176 N.W.2d 463 (1970). "Obviously, where proof of knowledge is unnecessary, allegations of the owner's knowledge are not required to state a statutory cause of action." *State ex rel. Oakland Co. Prosecuting Attorney v. Weaver*, 74 Mich.App. 462, 464, 254 N.W.2d 68 (1977).

I recognize that our Supreme Court has held, as noted by the majority, that proof of knowledge is required for abatement. *Schoonmaker, supra*. However, I also recognize that subsequent decisions of the Supreme Court have held that the statute, M.C.L. § 600.3815(2); M.S.A. § 27A.3815(2), obviates the need for proof of knowledge. *Bitonti, Robinson, supra*. See also *People ex rel. Wayne Prosecuting Attorney v. Tate*, 306 Mich. 667, 669, 11 N.W.2d 282 (1943). Given the clear, unambiguous language of the statute, I am convinced that *Bitonti, Tate, Robinson*, and *Weaver* are correct. I would hold that plaintiff was not required to allege knowledge on the part of Tina Bennis.

Defendants also claim that plaintiff failed to allege more than one isolated instance of use of the 1977 automobile for the purpose of lewdness, assignation, or prostitution. I would hold that plaintiff was not required to allege more than one use of the vehicle for the purposes proscribed in the statute.

Because of the unique characteristics of an automobile, and in particular its mobility, I would follow the opinion of Justice Bushnell in *Bitonti, supra*. In *Bitonti*, the Court held "that proof of only one isolated instance of violation of the statute was sufficient." *Id.*, 306 Mich. at p. 122, 10 N.W.2d 329. I am convinced that this is the proper interpretation to be given the public nuisance statute when a vehicle is used for the purpose of lewdness, assignation, or prostitution. The statute specifically provides that any vehicle used for the purpose of lewdness, assignation, or prostitution is declared a nuisance. M.C.L. § 600.3801; M.S.A. § 27A.3801. The statute does not require protracted use of the vehicle for purposes of lewdness, assignation, or prostitution, and in a case such as this, where the automobile is used as an indispensable part of the statutory violation, I would hold that a single incident is sufficient to sustain a finding of nuisance.

I am mindful that cases such as *Motorama Motel Corp., supra*, have held that a "nuisance involves the notion of repeated or continuing conduct and should not be based upon proof of a single isolated incident unless the facts surrounding the incident permit the reasonable inference that the prohibited conduct was habitual in nature." *Id.*, 105 Mich.App. at pp. 229–230, 307 N.W.2d 349. However, *Motorama Motel Corp.* involved a police officer who was accosted and solicited by a female at the Last Chance Bar and was then taken across the street to the defendant's motel by the female. *Id.*, at p. 225, 307 N.W.2d 349. The officer's affidavit indicated that the motel was only used for that purpose on a single occasion. *Id.*, at p. 230, 307 N.W.2d 349.

Given the obvious and inherent differences between a stationary or fixed building or structure and a mobile vehicle, it is my opinion that the better-reasoned rule allows a finding of public nuisance on the basis of a single instance of conduct involving the use of a vehicle for the purpose of lewdness, assignation, or prostitution. A building or fixed structure may be subject to continuous surveillance for the purpose of determining whether the premises are continuously or repeatedly being used for the purpose of lewdness, assignation, or prostitution. However, when a vehicle is used for any of the purposes set forth in M.C.L. § 600.3801; M.S.A. § 27A.3801, the authorities would have to determine that the same car was being used on a continuous or repeated basis for purposes proscribed by the statute. Because of the mobility of a vehicle, this would surely be nearly impossible.

As the majority notes, the purpose of the statute is to eliminate the use of property in connection with gambling, prostitution, and the illicit sale of liquor. *People ex rel. Wayne Prosecuting Attorney v. Sill*, 310 Mich. 570, 575, 17 N.W.2d 756 (1945); *State ex rel. Oakland Prosecuting Attorney v.*

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2. Nor is Mr. Bennis' conduct included within the nuisance statute merely because his conduct can be equated with gross indecency, and was therefore arguably disorderly. See *Diversified Theatrical Corp, supra*, 396 Mich. at 246, 250, 240 N.W.2d 460; *State ex rel. Oakland Prosecuting Attorney v. Alray Northcrest Plaza*, 146 Mich. App. 595, 602–604, 381 N.W.2d 731 (1985).

automobile is used as an part of the statutory viola- old that a single incident is stain a finding of nuisance. that cases such as *Motorama*, *supra*, have held that a ives the notion of repeated conduct and should not be oof of a single isolated inci- facts surrounding the inci- e reasonable inference that conduct was habitual in na- Mich.App. at pp. 229-230, . However, *Motorama Mo-* ed a police officer who was olicited by a female at the Bar and was then taken et to the defendant's motel *Id.*, at p. 225, 307 N.W.2d er's affidavit indicated that only used for that purpose casion. *Id.*, at p. 230, 307

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Ginell, 159 Mich.App. 679, 681-682, 407 N.W.2d 59 (1987). To require plaintiff to prove that the same vehicle was used on numerous occasions for purposes proscribed by the statute would thwart the purpose of the public nuisance statute.

Defendants also argued that the trial court erred in finding that a public nuisance existed where the evidence failed to show that John Bennis engaged in more than one isolated instance of proscribed conduct. Defendants further argue that there was no evidence presented to establish that Bennis paid Palarchio for performing the sexual act and that the conduct between Bennis and Palarchio was consensual.

As I have stated, it is my opinion that when a vehicle is used for the purpose of lewdness, assignation, or prostitution, proof of a single instance of conduct will support a finding that the vehicle constitutes a public nuisance pursuant to M.C.L. § 600.3801; M.S.A. § 27A.3801. Additionally, I am convinced that sufficient evidence was presented to establish that the Bennises' vehicle was used for the purpose of lewdness, assignation, or prostitution.

In *State ex rel. Macomb Co. Prosecuting Attorney v. Mesk*, 123 Mich.App. 111, 333 N.W.2d 184 (1983), this Court noted that the Supreme Court, in *State ex rel. Wayne Co. Prosecutor v. Diversified Theatrical Corp.*, 396 Mich. 244, 240 N.W.2d 460 (1976), found the meaning of the terms lewdness, assignation, and prostitution, as used in the abatement statute, to be clear. *Mesk*, 123 Mich.App. at p. 116, 333 N.W.2d 184. Although the Court in *Diversified Theatrical Corp.* did not expressly define the terms, it quoted from *Chicago v. Geraci*, 30 Ill.App.3d 699, 703, 332 N.E.2d 487 (1975), as follows:

> However, we find no confusion in the meaning of these terms. Although traditionally the term "lewdness" is viewed as being broader than and including the term "prostitution," ... such terms refer to *the same general class of activities* which are normally associated with houses of prostitution (or whatever such establishments may be called). They are intended to designate and prohibit sex acts of whatever nature which are performed for money. [Citation omitted; emphasis in *Diversified Theatrical Corp*, 396 Mich. at 250, n. 13, 240 N.W.2d 460.]

The majority states that John Bennis apparently was only charged with one count of gross indecency, M.C.L. § 750.338b; M.S.A. § 28.570(2), "presumably because there was no proof that the activities in which Mr. Bennis and Ms. Palarchio engaged were in exchange for payment." However, a review of plaintiff's complaint reveals that Bennis and Palarchio were arrested and charged with indecent and immoral conduct, specifically, engaging the services of a prostitute, M.C.L. § 750.449a; M.S.A. § 28.704(1), and gross indecency between male and female persons, M.C.L. § 750.338b; M.S.A. § 28.570(2).

Testimony indicated that on March 3, 1988, John Bennis was driving home from work in the 1977 Pontiac automobile. Bennis stopped the car at the corner of Eight Mile and Sheffield, where a young woman, Palarchio, was standing. At the time Bennis stopped his vehicle, he was being observed by two Detroit police officers who were working undercover for the vice squad.

Before Bennis stopped his vehicle, the officers observed Palarchio "flagging" cars in an effort to get them to stop. When Bennis stopped his vehicle, Palarchio walked to the passenger's side and entered the car. Bennis drove down the street, made a U-turn, parked, and turned off the car's headlights.

The officers followed, and parked approximately three car lengths behind the 1977 Pontiac. Officer Anthony testified that he saw two heads in the car, a female head on the right side and a male head on the left. Immediately after the officers parked their vehicle, the female head disappeared toward the driver's side of the car. The officers approached the vehicle and observed Palarchio performing an act of fellatio on Bennis.

Officer Anthony testified that it was a known fact that Palarchio had been working as a prostitute. She had been arrested many times before on charges of accosting and soliciting, indecent and obscene conduct, and disorderly conduct. Palarchio had also been arrested for "flagging" vehicles in an attempt to get them to stop.

I would find that the evidence was sufficient to support a finding that John Bennis used his vehicle for the purpose of lewdness, assignation, or prostitution. The trial court could properly infer from all the evidence presented that John Bennis, while occupying the 1977 Pontiac, engaged the services of Palarchio for the purpose of lewdness, assignation, or prostitution. Clearly, prostitution includes an act of fellatio. *Mesk*, 123 Mich.App. at p. 117, 333 N.W.2d 184.

Additionally, the trial court did not err in ordering abatement of the nuisance and extinguishing the proprietary interest of the innocent co-owner, Tina Bennis. As noted above, M.C.L. § 600.3815(2); M.S.A. § 27A.3815(2) obviated the requirement of proof of a defendant's knowledge of the existence of the nuisance. *Tate*, *Bitonti*, *Robinson*, *Weaver*, *supra*. Plaintiff was not required to show knowledge on the part of Tina Bennis.

I would affirm the judgment of the trial court declaring defendants' 1977 Pontiac automobile to be a nuisance and terminating their interest in the automobile.

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first-degree criminal sexual conduct, and he appealed. The Court of Appeals, Connor, J., held that: (1) prior consistent statements of ten-year-old complainant could be admitted once defendant impeached complainant's credibility by introducing prior inconsistent statements, and (2) complainant's invocation of physician-patient privilege did not preclude admission of treating physician's testimony at defendant's first trial, when privilege was waived.

Reversed and remanded.

Marilyn J. Kelly, J., concurred in result.

1. Witnesses ⇐414(2)

Prior consistent statements of ten-year-old complainant were admissible in prosecution for first-degree criminal sexual conduct after defendant impeached complainant's credibility by introducing portions of statements to show how they were inconsistent with complainant's trial testimony.

2. Witnesses ⇐211(2)

Physician-patient privilege statute prohibited ten-year-old complainant's doctor, who had conducted rectal examination of complainant shortly after anal penetration was alleged to have taken place and found no evidence of trauma, from testifying in prosecution for first-degree criminal sexual conduct once privilege was asserted. M.C.L.A. § 600.2157.

3. Witnesses ⇐219(5)

Complainant's waiver of physician-patient privilege at defendant's first trial did not prevent assertion of privilege at new trial granted on charge of first-degree criminal sexual conduct. M.C.L.A. § 600.2157.

4. Witnesses ⇐219(4.1)

Invocation of physician-patient privilege by ten-year-old complainant in prosecution for first-degree criminal sexual con-

200 Mich.App. 594

PEOPLE of the State of Michigan, Plaintiff-Appellee,

v.

Allen J. SAYLES, Defendant-Appellant.

Docket No. 123576.

Court of Appeals of Michigan.

Submitted March 2, 1993, at Lansing.

Decided July 19, 1993, at 9:05 a.m.

Released for Publication Sept. 23, 1993.

Defendant was convicted in the Lapeer Circuit Court, Martin E. Clements, J., of

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duct did not bar admissi sician's testimony given trial, when privilege was § 600.2157; MRE 804(a

5. Criminal Law ⇐117

Trial court's error i ten-year-old complainan physician-patient privile sion of treating physicia defendant's first trial, had been waived, was prosecution for first-deg conduct, where physic rectal examination of after anal penetration taken place but found ma. M.C.L.A. § 600.21 (b)(1).

Frank J. Kelley, Att Casey, Sol. Gen., Nick Atty., and Todd C. Moh for the people.

Matthew Posner, Su defendant on appeal.

Before MICHAEL J. MARILYN J. KELLY

CONNOR, Judge.

A jury found defen degree criminal sexu § 750.520b(1)(a); M.S. The trial court senter prison. Defendant a We reverse.

Defendant was char of criminal sexual con old complainant testi was nine years old, def in several acts of sex her.

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MICHIGAN *ex rel* WAYNE COUNTY PROSECUTOR v BENNIS

Docket No. 97339. Argued October 5, 1994 (Calendar No. 5). Decided December 30, 1994.

The Wayne County Prosecutor brought an abatement action in the Wayne Circuit Court, contending that a vehicle owned by John C. and Tina Bennis, used in an act of prostitution involving John Bennis, was a public nuisance under MCL 600.3801; MSA 27A.3801. Tina Bennis claimed she did not know that the vehicle had been used in violation of the statute and, thus, that her interest could not be abated. The court, Michael J. Talbot, J., held that the vehicle was a nuisance and abated the interest of the defendants. The Court of Appeals, MURPHY and MARILYN J. KELLY, JJ. (JANSEN, P.J., dissenting), reversed, holding that under *People v Schoonmaker*, 241 Mich 177 (1927), the prosecution failed to prove that Tina Bennis knew the defendant used the vehicle in a manner proscribed by the statute; that it failed to demonstrate that an act of lewdness, assignation, or prostitution occurred; and that proof of a single incident of lewdness, assignation, or prostitution is insufficient to establish a nuisance (Docket No. 132568). The people appeal.

In an opinion by Justice RILEY, joined by Justices BOYLE and MALLETT, with Justice GRIFFIN concurring only in the result, the Supreme Court reversed the decision of the Court of Appeals.

Justice RILEY, joined by Justices BOYLE and MALLETT, stated that lewdness, incidental to an act of prostitution, is activity squarely within the purview of the nuisance abatement statute. Proof of an exchange of money is not necessary where it is clear from the totality of circumstances that the sexual act was in exchange for payment. In this case, the abatement of the vehicle was proper. The defendant entered a neighborhood known for prostitution and used his vehicle to engage in illicit activity, thereby contributing to an existing nuisance. Under the nuisance abatement statute, knowledge or consent is not required to abate the interest of a co-owner.

The nuisance abatement statute requires that the act committed be one of lewdness, assignation, or prostitution. Conduct constituting lewdness or assignation is limited to those instances in which an act occurs in furtherance or for the

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purpose of prostitution. In this case, the defendant's conduct constitutes lewdness because it occurred in a residential neighborhood and was in furtherance of an act of prostitution. He engaged in the act with a known prostitute in an area reputed for illicit activity, and, while no exchange of money was witnessed, from the totality of the circumstances, a clear inference may be drawn that the sexual act was committed in exchange for monetary compensation. Thus, proof of an actual exchange of money is not required.

MCL 600.3801; MSA 27A.3801 provides for the abatement of a vehicle used for the purpose of lewdness, assignation, or prostitution. A public nuisance has been held to exist where an act offends public decency and involves a continuing detrimental effect on the public. Evidence of the general reputation of a place is admissible for the purpose of proving the existence of a nuisance. This case involves a condition that, on the basis of the record, is a public nuisance in the neighborhood at issue. Vehicles that enter the neighborhood to solicit acts of prostitution are being used for the continuance of this nuisance. The one act of nuisance by the defendant in his vehicle must be viewed in light of the larger and continuing nuisance occurring in the neighborhood. Where testimony surrounding the proof of an incident of prostitution unequivocally establishes that the neighborhood has a reputation for prostitution, the property contributing to the continuance of the nuisance may be abated.

In light of the plain language of the nuisance abatement statute and decisions of the Michigan Supreme Court that have applied it, a co-owner need not consent to or acquiesce in the illegal use of property in order for abatement to be ordered. The statute does not violate the constitution. The trial judge did not abuse his discretion in fashioning an appropriate remedy, abating the vehicle.

Chief Justice CAVANAGH, joined by Justices LEVIN and BRICKLEY, dissenting, stated that the condition of the neighborhood in this case is not the public nuisance. Further, a single act of prohibited conduct is insufficient to support abatement without evidence that the conduct is habitual or continuing. Public nuisances, by their nature, imply a continuing condition. The statute is aimed at property that has become so associated with an activity that it has become part of the activity. In this case, the vehicle abated was only a convenient site for the activity, and the activity was insufficient to subject the vehicle to abatement under the statute.

Justice LEVIN, dissenting, stated that a vehicle is not subject

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to a nuisance abatement action unless the person owning or in lawful possession of it is engaged in and uses it in the conduct of illicit activity, described in the statute, as a business.

The general reputation of a place may be considered for the purpose of showing that the place is a nuisance, and of a vehicle for the purpose of showing that the vehicle is a nuisance. But the general reputation of a place where the vehicle is driven or used, under the statutory provision for use of general reputation evidence, may not be relied on for the purpose of showing that the vehicle is a nuisance.

Unless a vehicle itself is a nuisance, it is not subject to abatement, and it is not within the intendment of the statute. Unless a place itself is a nuisance, i.e., a place used for the purpose of prostitution, or used by or kept for the use of prostitutes, it is not subject to abatement, and it is not within the intendment of the statute. The Legislature clearly did not intend that an entire residential neighborhood where prostitutes roam, as a place, was subject to abatement.

The statutory provision that the prosecutor is not required to offer proof of knowledge of the existence of the nuisance on the part of the defendants or any of them does not make an owner's lack of knowledge immaterial or irrelevant regarding whether property that is subject to abatement as a nuisance should be forfeited. As a matter of statutory construction, an innocent co-owner's share of a vehicle should not be subject to forfeiture.

200 Mich App 670; 504 NW2d 731 (1993) reversed.

Frank J. Kelley, Attorney General, *Thomas L. Casey*, Solicitor General, *John D. O'Hair*, Prosecuting Attorney, *George E. Ward*, Chief Assistant Prosecuting Attorney, *Andrea Solak*, Chief, Special Operations, and *Larry L. Roberts*, Assistant Prosecuting Attorney, for the plaintiff.

ACLU Fund of Michigan (by *Paul J. Denenfeld*) for the defendants.

RILEY, J. In this case, we are required to construe various aspects of the nuisance abatement

statute, MCL 600.3801; MSA 27A.3801.[1] Specifically, we must decide whether an act of prostitution was consummated absent proof that money was exchanged. Next, we must determine whether the trial court erred in abating a vehicle used to commit an act of prostitution in a neighborhood with a reputation for illicit activity. Finally, we must consider whether a co-owner's interest in a vehicle may be abated where the co-owner allegedly had no knowledge that the vehicle was used in proscription of the statute.

We would hold that lewdness, incidental to an act of prostitution, is activity squarely within the purview of the nuisance abatement statute. Alternatively, we conclude that proof of an exchange of money is not necessary where, as here, it is clear from the totality of circumstances that the sexual act was in exchange for payment. Additionally, we would uphold the abatement of this vehicle because the defendant entered a neighborhood that is a known place for prostitution and used his vehicle to engage in illicit activity, thereby contributing to the existing nuisance. Finally, pursu-

[1] Any building, vehicle, boat, aircraft, or place used for the purpose of lewdness, assignation or prostitution or gambling, or used by, or kept for the use of prostitutes or other disorderly persons, or used for the unlawful manufacture, transporting, sale, keeping for sale, bartering, or furnishing of any controlled substance as defined in section 7104 of the public health code, Act No. 368 of the Public Acts of 1978, being section 333.7104 of the Michigan Compiled Laws, or of any vinous, malt, brewed, fermented, spirituous, or intoxicating liquors or any mixed liquors or beverages, any part of which is intoxicating, is declared a nuisance, and the furniture, fixtures, and contents of the building, vehicle, boat, aircraft, or place and all intoxicating liquors therein are also declared a nuisance, and all controlled substances and nuisances shall be enjoined and abated as provided in this act and as provided in the court rules. Any person or his or her servant, agent, or employee who owns, leases, conducts, or maintains any building, vehicle, or place used for any of the purposes or acts set forth in this section is guilty of a nuisance.

ant to the clear and unambiguous language of the statute, we would hold that knowledge or consent is not required to abate the interest of a co-owner.

I

John Bennis was arrested for gross indecency on the evening of October 3, 1988. On that evening, Detroit police officers Jacob Anthony and John Howe set up surveillance after they witnessed a woman "flagging"[2] passing vehicles on the corner of Eight Mile and Sheffield. The woman was later identified as Kathy Polarchio. The officers next observed a 1977 Pontiac, driven by a man, later identified as John Bennis, turn onto Sheffield and stop near Ms. Polarchio, who approached and entered the passenger side of the Pontiac. The officers followed the Bennis vehicle, which proceeded a block, made a U-turn, and stopped. Surveillance continued until the officers noticed Ms. Polarchio's head disappear toward the driver's side of the Pontiac. The officers immediately approached the Bennis vehicle, shined a flashlight into the front seat, and witnessed Ms. Polarchio performing an act of fellatio on Mr. Bennis.

Mr. Bennis was convicted of gross indecency in violation of MCL 750.338b; MSA 28.570(2).[3] The Wayne County prosecutor then filed a complaint alleging that the Bennis vehicle was a public nuisance subject to abatement pursuant to MCL 600.3801; MSA 27A.3801. The vehicle was co-owned by Mr. Bennis' wife, Tina Bennis, who claimed that she had no knowledge that her husband ever used their vehicle in violation of the statute. The trial judge held that the vehicle was a nuisance and abated the interest of defendant and his wife.

[2] "Flagging" is the manner in which prostitutes solicit business from potential customers in passing vehicles.

[3] Ms. Polarchio was arrested the next day for accosting and soliciting. She had formerly been arrested on several occasions for disorderly conduct, accosting and soliciting, and indecent and obscene conduct.

The Court of Appeals reversed the decision of the trial court,[4] holding first that the prosecution had an obligation under *People v Schoonmaker*, 241 Mich 177; 216 NW 456 (1927), to demonstrate that Mr. Bennis' wife knew that he used the vehicle in a manner proscribed by the statute and failed to offer such proof.[5] The Court of Appeals next held that under *State ex rel Oakland Co Prosecutor v Motorama Motel Corp*, 105 Mich App 224; 307 NW2d 349 (1981), proof of a single incident of lewdness, assignation, or prostitution is insufficient to establish a nuisance. Finally, the Court of Appeals held that the prosecution failed to demonstrate that an act of lewdness, assignation, or prostitution occurred.

We granted leave to appeal[6] and now reverse the decision of the Court of Appeals.

II

We turn first to whether the act committed in the Bennis vehicle is within the purview of the nuisance abatement statute. Consistent with the 1909 Iowa "red light abatement acts," upon which the Michigan statute is based,[7] the Michigan statute requires that the act be one of "lewdness, assignation *or* prostitution."[8] In *State ex rel*

[4] 200 Mich App 670; 504 NW2d 731 (1993).

[5] *Schoonmaker* was based on a predecessor statute, 1925 PA 389; however, the relevant language is virtually identical to the present statute. See n 24.

[6] 445 Mich 861 (1994).

[7] *State ex rel Wayne Co Prosecutor v Diversified Theatrical Corp*, 396 Mich 244, 246; 240 NW2d 460 (1976).

[8] See n 1 (emphasis added).

Wayne Co Prosecuting Attorney v Levenburg, 406 Mich 455; 280 NW2d 810 (1979), this Court used the rule of construction, *noscitur a sociis*, to define assignation in the statute.[9] The Court upheld the abatement of a bar because it was used for accosting and soliciting acts of prostitution. In other words, "the making of an appointment for the purpose of prostitution" constituted assignation under the statute. *Id.* at 466. *Levenburg* based its decision on *State ex rel Wayne Co Prosecutor v Diversified Theatrical Corp*, 396 Mich 244, 246-250; 240 NW2d 460 (1976). *Diversified* essentially held that while lewdness, assignation, and prostitution are set forth in the alternative, the conduct constituting lewdness or assignation must be incidental to or in furtherance of an act of prostitution.[10]

In the instant case, the prosecution maintains that an act of lewdness, within the context of the nuisance abatement statute, occurred. Although this aspect of the statute has yet to be defined,[11] we

[9] The doctrine should be applied where legislative intent is not clear, so that "when two or more words are grouped together, and ordinarily have a similar meaning, but are not equally comprehensive, the general word will be limited and qualified by the special word." 2A Singer, Sutherland Statutory Construction (5th ed), § 47.16, p 183. See also *Williams & Works, Inc v Springfield Corp*, 408 Mich 732, 746; 293 NW2d 304 (1980).

[10] *Diversified* relied on *State v Morley*, 63 NM 267, 270-271; 317 P2d 317 (1957), which stated "we are led to believe that the legislature intended 'lewdness' to be limited to acts in connection with 'assignation' or 'prostitution' " and further noted that "[t]he term 'lewdness' is a broader and more general term than 'assignation' or 'prostitution.' " See also *State ex rel Oakland Prosecuting Attorney v Ginell*, 159 Mich App 679, 681; 407 NW2d 59 (1987), in which the Court of Appeals held that the activity must not be consensual in nature, whether lewd, obscene, or disorderly; *State ex rel Wayne Co Prosecuting Attorney v Dixy Duck*, 203 Mich App 250, 260; 511 NW2d 907 (1994), where the Court of Appeals concluded that lewdness "as used in the nuisance abatement statute, refers to those sexual acts . . . performed on another where done for hire."

[11] In *Diversified*, we did not define lewdness, but simply held that no interest was abatable because the conduct was unrelated to live acts of prostitution on the premises.

agree with the contention put forth by the prosecution.

We analogize the definition of "assignation" in *Levenburg* with the definition we now give to "lewdness." *Levenburg* looked to the common meaning of "assignation" and concluded that the common definition of the term is limited to those instances in which the act of assignation is "for the purpose of prostitution." *Id.* at 466. In this manner, the common definition of "lewdness" includes a lustful and obscene display of illicit sexual activity.[12] Utilizing the common meaning of "lewdness,"[13] we also conclude that it is limited to those instances in which an act of lewdness occurs in furtherance of or for the purpose of prostitution.

This result is consistent with Michigan decisions in *Diversified* and *Levenburg, supra*, as well as other jurisdictions interpreting similar language.[14] For example, in *Pennsylvania v MacDonald*, 464 Pa 435, 460-461; 347 A2d 290 (1975), the court addressed the issue of lewdness and concluded:

[12] See also 50 Am Jur 2d, Lewdness, Indecency, Etc, § 1, pp 450-451:

> Lewdness has been defined as the unlawful indulgence of lust. It signifies that form of immorality which has relation to sexual impurity, and is generally used to indicate gross indecency with respect to the sexual relations. Illicit intercourse may under some circumstances constitute lewdness, but there may also be lewdness without any such act.

[13] The *Random House College Dictionary of the English Language: Unabridged Edition* defines "lewd" as:

> 1. inclined to, characterised by, or inciting to lust or lechery; lascivious. 2. obscene or indecent, as language or songs; salacious. 3. Obs. a. low, ignorant, or vulgar. b. base, vile, or wicked, esp. of a person. c. bad, worthless or poor, esp. of a thing.

[14] See *Levenburg* and *Diversified* and cases cited therein.

> Far more important than mere dictionary definitions is the statutory context in which the word "lewdness" appears. That context proscribes use of any building "for the purpose of fornication, . . . assignation, and/or prostitution." All of these forbidden purposes involve illicit sexual *conduct*, thus strongly indicating a legislative intention to proscribe only purposes of this type when it used the word "lewdness." Such a construction has the further advantage of obviating any problems of vagueness which might be entailed by construing the term "lewdness" in a broader fashion. [Emphasis supplied.]

In the case at bar, Mr. Bennis' conduct constitutes lewdness because it occurred in a residential neighborhood and was in furtherance of an act that traditionally forms the basis of a prostitution charge, i.e., fellatio.[15] This result is consistent with the definition of assignation in *Levenburg, supra* at 466. Indeed, we find particularly persuasive the fact that Mr. Bennis engaged in this act with a known prostitute in an area reputed for illicit activity.[16] Therefore, while no money was exchanged, the conduct clearly satisfies statutory requirements and is subject to abatement.

Moreover, even if we did not find the conduct lewd within the meaning of the nuisance abatement statute, we are persuaded that from the totality of the circumstances, an act of prostitution occurred. We primarily rely on the uncontroverted testimony of Detroit police officer Jacob Anthony who, along with his partner, witnessed Ms. Polar-

[15] We do not decide whether property may be abated for an act of lewdness where the conduct is not that which traditionally forms a charge of prostitution.

[16] The record is devoid of any evidence that Mr. Bennis raised in his defense that this activity was consensual or that he and Ms. Polarchio had some prior relationship.

chio "flagging"[17] passing vehicles on Eight Mile and Sheffield. His testimony is a compelling indication that an act of prostitution occurred. As previously stated, the officers witnessed the Bennis vehicle stop in response to Ms. Polarchio's "flagging" and saw her enter the vehicle posthaste. The vehicle proceeded and within minutes again came to a stop. Ms. Polarchio's head immediately disappeared, and the officers then observed the two engaged in fellatio. The dissent fails to address this most persuasive testimony.

We are additionally persuaded by the following facts which support our conclusion. One witness, Sammie Parham, a security guard at a business located at Six Mile and Woodward, testified that he had seen Mr. Bennis in the area during the summer before Bennis' October 3, 1988, arrest. Mr. Parham saw Mr. Bennis talking to a prostitute on two separate occasions and ushered the prostitutes away in both instances just as they were about to enter the Bennis vehicle.

Furthermore, it is uncontested that Ms. Polarchio had been arrested several times for solicitation and disorderly conduct. The arresting officer testified that Mr. Bennis stopped at the waving, or what he perceived to be the "flagging," by Ms. Polarchio. Additionally, we are persuaded by Mr. Bennis' admission at trial that he normally proceeds home across Eight Mile and turns north onto Woodward. It is uncontested that on the evening in question, Mr. Bennis drove down Eight Mile and proceeded *south* on Sheffield, the opposite direction of his home. It is also undisputed that minutes after he turned onto Sheffield and picked up Ms. Polarchio, two officers found them engaged in fellatio.

[17] See n 2.

While the officers did not actually witness an exchange of money, from the testimony elicited at trial, a clear inference may be drawn that the sexual act was in exchange for monetary compensation. In his defense, Mr. Bennis has not asserted that he and Ms. Polarchio had a relationship or even knew one another, precluding any inference that the act was consensual, rather than for hire. We do not shift the burden of proof to defendant on this issue. We clearly have sufficient testimony on the record which supports that an act of prostitution occurred. We merely find it noteworthy that, as a matter of fact, Mr. Bennis has not asserted in his defense that there was a prior or existing relationship between himself and Ms. Polarchio.

In sum, we are persuaded by the testimony of the officer witnessing the act and the stated additional facts that augment our decision. Under these circumstances, proof of an actual exchange of money is not required. An action will not be denied merely because the witnessing officers do not allow the illicit activity to proceed to the point where money is exchanged. We therefore conclude that the Court of Appeals erred in holding that the prosecution failed to demonstrate that an act of lewdness, assignation, or prostitution occurred in the Bennis vehicle.

III

As noted above, MCL 600.3801; MSA 27A.3801 provides for the abatement of a vehicle used for the purpose of lewdness, assignation, or prostitution. However, the statute does not define the extent of activity required to constitute a nuisance. Therefore, we must next determine whether *an* act of prostitution committed in a neighborhood

known for illicit activity is within the purview of the statute.

A

Although the issue has not been resolved by appellate decisions of this state, an attempt was made to clarify the definition of nuisance in *Motorama Motel, supra*. Citing *People ex rel Wayne Prosecuting Attorney v Bitonti*, 306 Mich 115; 10 NW2d 329 (1943), *Motorama* held that "[a] nuisance involves the notion of repeated or continuing conduct and should not be based upon proof of a single isolated incident unless the facts surrounding that incident permit the reasonable inference that the prohibited conduct was habitual in nature." *Id.* at 229-230. However, *Motorama*'s reliance on *Bitonti* is belied by the fact that only four of the eight justices in *Bitonti* held that a single act was sufficient to constitute an abatable nuisance.[18]

As a result, existing Michigan precedent does not specifically require more than a single incident of conduct. However, cognizant of the activity that has implicitly constituted a nuisance in previous actions,[19] we must determine whether the activity

[18] Four justices held that a single act was sufficient, three held it was not, and one concurred in the reversal of the abatement but "without expressing the opinion that proof of a single violation would be insufficient to establish the existence of a nuisance under all circumstances." *Id.* at 120.

[19] We acknowledge that many abatement cases in this state based on identical predecessor statutes involved a nuisance where more than a single act of conduct was proved or could be inferred. *People ex rel Wayne Prosecuting Attorney v Sill*, 310 Mich 570, 572; 17 NW2d 756 (1945), abated the interest of a vehicle where proof was submitted that the owner was engaged in the "numbers racket" and had in his possession a number of betting slips. *State ex rel Wayne Prosecuting Attorney v Martin*, 314 Mich 317, 322; 22 NW2d 381 (1946), held that "[t]he testimony of defendant would of itself be a sufficient basis for the court's finding that defendant had used the

in this case properly falls within the definition of nuisance as used in MCL 600.3801; MSA 27A.3801.

B

Because the public nuisance statute allows the abatement of property used in a proscribed manner without specifying the activity that will constitute a nuisance, we are aided in the definition of a nuisance by general public nuisance law. This Court has defined a public nuisance as involving "not only a defect, but threatening or impending danger to the public . . . ." *Kilts v Kent Co Bd of Supervisors*, 162 Mich 646, 651; 127 NW 821 (1910). Similarly, this Court has declared a public nuisance where an act "offends public decency." *Bloss v Paris Twp*, 380 Mich 466, 470; 157 NW2d 260 (1968).[**] Finally, *Garfield Twp v Young*, 348 Mich 337, 342; 82 NW2d 876 (1957), held that to constitute a nuisance

> the activity must be harmful to the public health, or create an interference in the use of a way of

automobile in question on the very day of his arrest and the preceding day for the illegal purposes [gambling] claimed by plaintiff" and therefore was abatable pursuant to the nuisance abatement statute. *Levenburg*, *supra* at 466-467, upheld the abatement of a Detroit bar where there was testimony that prostitutes frequently solicited customers to perform sexual acts elsewhere. In *State ex rel Macomb Co Prosecuting Attorney v Mesk*, 123 Mich App 111, 123; 333 NW2d 184 (1983), the Court relied on *Motorama*, requiring that the prosecution establish that the nuisance was continuing in nature. A continuing nuisance was established where four undercover police officers made separate visits to a massage parlor over a nine-month period and each time a model agreed to perform sexual services.

[**] In *Bloss*, *supra*, this Court upheld the lower court's injunction of the operation of an outdoor theater showing explicit movies where neighborhood children could view the films from outside the drive-in. *Id.* at 468-469. The Court held: "It is our judgment that the foisting off of a display of pictures not fit for children to see onto places within their view on public streets, on residential properties and in private homes, without the consent of the property owners and the parents, is a public nuisance." *Id.* at 470.

> travel, or affect public morals, or prevent the public from the peaceful use of their land and the public streets. [Citations omitted.]

The rationale is that a nuisance involves a continuing detrimental effect on the public. The nuisance abatement statute serves the same general purpose. Therefore, mindful of the activity that generally constitutes a public nuisance, we apply these principles to the context of the nuisance abatement statute.

C

In construing the nuisance abatement statute, "effect must be given, if possible, to every word, sentence and section." *Grand Rapids v Crocker*, 219 Mich 178, 182; 189 NW 221 (1922). Moreover, to discover the legislative intent, "the entire act must be read, and the interpretation to be given to a particular word in one section arrived at after due consideration of every other section so as to produce, if possible, a harmonious and consistent enactment as a whole." *Id.* at 182-183. However,

> [w]here the language of a statute is of doubtful meaning, a court must look to the object of the statute in light of the harm it is designed to remedy, and strive to apply a reasonable construction that will best accomplish the Legislature's purpose. [*Marquis v Hartford Accident & Indemnity*, 444 Mich 638, 644; 513 NW2d 799 (1994). Citations omitted.]

Pursuant to these rules of construction, we consider MCL 600.3815; MSA 27A.3815 in our analysis of whether an abatable nuisance exists. The section provides:

> In any action brought under this chapter, evi-

dence of the general reputation of the building, vehicle, boat, aircraft *or* place is admissible for the purpose of proving the existence of the nuisance. [Emphasis added.]

The nuisance abatement statute's use of the disjunctive "or" allows us to consider the reputation of the vehicle *or* the place to determine whether a nuisance exists. The *Random House College Dictionary* defines "place" as "an open space, or square, in a city or town," "a short street, court," and "an area of habitation, as a city, town, or village." Given the unique facts in this case, we focus on the word "place" set forth in MCL 600.3815(1); MSA 27A.3815(1). We conclude that the word "place" may encompass a neighborhood, and we therefore consider the general reputation of the area surrounding the Eight Mile and Sheffield intersection for purposes of determining the existence of a nuisance.[21]

Several members of that neighborhood testified about numerous incidents where they had personally been accosted and solicited. The arresting officer confirmed that many arrests for prostitution were made in that neighborhood. Several neighbors testified that they had been solicited on more than one occasion. One witness testified that he had observed acts of prostitution near the corner of Eight Mile and Gardendale and that on one occasion he found his young son staring at strange vehicles parked near that corner in which men

[21] See *State ex rel Wayne Co Prosecuting Attorney v Bernstein*, 57 Mich App 204, 206; 226 NW2d 56 (1974), upholding the abatement of a bar under MCL 600.3801; MSA 27A.3801 where "officers testified to numerous arrests for accosting and soliciting, and to the general reputation of the Vernor Bar as a place where the services of a prostitute can easily be obtained." See also *People v Lee*, 307 Mich 743, 753; 12 NW2d 418 (1943), upholding admission of testimony of three witnesses about the "general reputation in the vicinity" of a house of prostitution in an action to convict the owner of the house.

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and women were apparently committing acts of prostitution. These incidents reflect concerns identical to those cited in *Garfield* and *Bloss*, *supra*.

Thus, the present case involves a condition that, on the basis of the record below, is a public nuisance in this neighborhood. It cannot be contested that a significant threat to public peace and safety exists in the Eight Mile and Sheffield neighborhood. Vehicles that enter the neighborhood in order to solicit acts of prostitution are being "used for" the continuance of this nuisance. Therefore, we would hold that the nuisance abatement statute allows the abatement of a vehicle where the driver entered into and thereby contributed to an existing condition that is a public nuisance.[22]

D

This remedy is also buttressed by our review of the overall objective of the nuisance abatement statute. We note that in 1988, minor changes were made to the statute.[23] It appears clear from the amendment that the Legislature intended to remedy the inevitable decline of vice-laden neighborhoods. In the amendment, references to "narcotic and/or hypnotic drug" were changed to the broader and more encompassing phrase, "controlled substance." The arguments presented in support of the amendment stated: "Dope houses are a plague upon the city neighborhoods in which they occur. Drug trafficking, violent crime, and theft endanger and disrupt the lives of law-abiding

[22] We note that our position is limited to situations in which a nuisance condition exists, regardless of the city. Therefore, a vehicle could not be abated if the same situation arose in another area of Detroit, such as Palmer Woods, where certainly no such nuisance condition exists.

[23] The 1988 amendment was in effect when the act occurred in the Bennis vehicle.

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citizens. The appearance of dope houses can put an entire neighborhood into decline."[34]

The legislative objective was also addressed in *People ex rel Wayne Prosecuting Attorney v Sill*, 310 Mich 570; 17 NW2d 756 (1945). In *Sill*, this Court held that the purpose of the nuisance abatement statute[35] was "to eliminate effectively, by statutory procedure, the use of property, real or *personal*, in connection with gambling, *prostitution*, and illicit sale of liquor . . . ." *Id.* at 575 (emphasis added). Similarly, *State ex rel Wayne Co Prosecuting Attorney v Bernstein*, 57 Mich App 204, 208; 226 NW2d 56 (1974), held that "[t]he padlock law is designed to facilitate the elimination of certain situations which have been found to interfere with a substantial community interest." Thus, we believe that our position is consistent with the intent of the Legislature.

E

Moreover, the holding in *State ex rel Attorney*

[34] House Legislative Analysis, HB 4317, May 13, 1987.

[35] The present statute is almost identical to its predecessor on which the *Sill* case is based. The statute read as follows:

> Any building, vehicle or place used for the purpose of lewdness, assignation or prostitution or gambling, or used by, or kept for the use of prostitutes or other disorderly persons, or used for the unlawful manufacture, storing, possessing, transporting, sale, keeping for sale, giving away, bartering, furnishing or otherwise disposing of any vinous, malt, brewed, fermented, spirituous or intoxicating liquors or any mixed liquors or beverages, any part of which is intoxicating, is hereby declared a nuisance and the furniture, fixtures and contents of any such building, vehicle or place, and all such intoxicating liquors therein are also declared a nuisance, and all such nuisances shall be enjoined and abated as hereinafter provided. Any person, or his servant, agent or employe who shall own, lease, conduct or maintain any building, vehicle or place used for any of the purposes or by any of the persons above set forth or where any of the acts above enumerated are conducted, permitted or carried on, is guilty of a nuisance. [1929 CL 9093. Cf. n 1.]

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General v Robinson, 250 Mich 99; 229 NW 403 (1930), is analogous to our position in the present case and conclusively persuades us that we have achieved a remedy consistent with the legislative intent. In *Robinson*, one apartment in a fifty-unit building was abated where proof of a *single* incident of prostitution was submitted. A police officer witnessed a solicitation by a prostitute and the entry of the apartment to commit the act. Although there was proof of only one act of prostitution in the abated apartment, this Court considered the general reputation of the building and the fact that the woman pleaded guilty to charges of prostitution and concluded that "the nuisance use of the premises . . . can be found without drawing on the imagination." *Id.* at 104.

The dissent maintains that reliance on *Robinson* is misplaced. The dissent's recitation of the facts of *Robinson*, however, only confirms that it is persuasive authority for the proposition that a single act sufficiently constitutes a nuisance where a larger nuisance condition exists. The dissent correctly states: "A police officer witnessed a solicitation outside the building, watched two persons go into the building, and arrested the pair when they came out of the building." *Post*, p 746 (emphasis added). It is vital to note that ultimately the only apartment abated was the one in which a single act of prostituion occurred. Further, it was only abated after consideration of the reputation of the larger nuisance condition existing in the building itself, which could not be abated in that case.

As previously stated, the nuisance abatement statute has remained virtually unchanged since *Robinson*, and our position therefore would apply a priori to the present case. The one act of prostitution in *Robinson* was considered with regard to

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the general reputation of the entire building. Similarly, the one act of nuisance by Mr. Bennis in his vehicle must be viewed in light of the larger and continuing nuisance occurring in the neighborhood. Where testimony surrounding proof of an incident of prostitution unequivocally establishes that the neighborhood has a reputation for prostitution, the property contributing to the continuance of the nuisance may be abated pursuant to the statute. To hold otherwise would allow the criminal actors to circumvent the statute where a different vehicle was used in the commission of each offense. The result would permit the continuing blight of neighborhoods, contrary to the clear intent of the statute. Accordingly, we would hold that the Court of Appeals erred in concluding that the act of prostitution occurring in the Bennis vehicle in a neighborhood known for prostitution was not an abatable nuisance.

IV

Finally, we consider whether a co-owner's interest in a vehicle may be abated where the co-owner had no knowledge that the vehicle was used in a manner proscribed by the nuisance abatement statute. Despite the clear and unambiguous language of the statute indicating that a property owner's knowledge or consent is not required,[26] decisions of this state have nonetheless reached different conclusions with respect to this issue. We would resolve the conflict and would hold that knowledge is not required.

[26] "Proof of knowledge of the existence of the nuisance on the part of the defendants or any of them, is not required." MCL 600.3815(2); MSA 27A.3815(2). The language is nearly identical to the original language of the public nuisance statute: "Proof of knowledge of the existence of such nuisance on the part of the defendants or any of them, shall not be required." 1925 PA 389, § 9.

A

The schism has its underpinnings in *Schoonmaker, supra,* a pre-1988 case. *Schoonmaker* seemingly required proof of an owner's consent to the illegal use of the property to be abated. The clear language of the nuisance abatement statute abrogates the requirement of knowledge.[27] In *Schoonmaker,* certain illegal acts were committed by people attending a dance hall. However, those acts were not committed inside the dance hall; instead, patrons consumed intoxicating liquor outside the hall. In this manner, all proscribed activity was divorced from the property sought to be abated. The property itself was not in any way used to facilitate the proscribed act, unlike the set of facts before us.

On the basis of these facts, it appears that Justice WIEST in *Schoonmaker* did not intend a result inconsistent with the nuisance abatement statute. Additionally, it is apparent that Justice WIEST did not intend to contradict the provision of the abatement statute because only three years later in *Robinson, supra* at 103, Chief Justice WIEST concluded that the statute "expressly obviates need of knowledge on the part of the owner of nuisance use of his premises."

Schoonmaker, however, begat confusion regarding the statutory requirement of knowledge. Subsequent cases have ruled consistently with the result that an owner's knowledge is not required. *Bitonti, supra,* and *People ex rel Wayne Prosecuting Attorney v Tate,* 306 Mich 667; 11 NW2d 282 (1943), involved the abatement of a motor vehicle illegally used for gambling. Both cases relied on the statute, holding that an owner's knowledge is

[27] See n 26.

not required.[28] However, several other cases apparently read *Schoonmaker* to require the owner's knowledge.[29] In light of the plain language of the nuisance abatement statute and the Michigan Supreme Court decisions in *Robinson, Bitonti,* and *Tate,* we would hold that the statute expressly obviates the requirement that an owner consent to or acquiesce in the illegal use of property.[30] We likewise would hold that *Schoonmaker* is distinguishable because in that case "[i]ntoxicating liquor was not used in the dance hall but secreted by patrons outside of the hall and secretly visited. *Id.* at 182.[31]

B

Finally, therefore, we consider the constitutional

[28] Also, in *State ex rel Oakland Prosecuting Attorney v Weaver,* 74 Mich App 462, 464; 254 NW2d 68 (1977), the Court of Appeals again considered the knowledge requirement of the nuisance statute and concluded: "Considering the clear language of the statute, we are convinced that *Robinson, Bitonti* and *Tate* are correct."

[29] In *State ex rel Wayne Prosecuting Attorney v Weitzman,* 21 Mich App 705, 711; 176 NW2d 463 (1970), the Court held that an owner must have knowledge of acts of prostitution before padlocking the premises. *Weitzman* acknowledged *Robinson* and its progeny, but chose the course initiated by *Schoonmaker. Id.* Likewise, in *Motorama, supra* at 228, the Court of Appeals returned to the *Schoonmaker* decision, after *Weaver,* n 28 *supra* stating that it had never been formally overruled. *Motorama* also cited dicta from *Levenburg, supra,* supporting its decision requiring an owner's knowledge:

> [W]e acknowledge that a judgment for abatement in a prosecution of this nature cannot be rendered without a finding of knowledge of the accosting and soliciting on the part of the owners or operators of the place found to be a nuisance and their acquiescence in those activities. [*Id.* at 462, n 1.]

[30] As explained in *McKibbin v Corp & Securities Comm,* 369 Mich 69, 81; 119 NW2d 557 (1963), "[w]e have no other duty to perform than to construe the legislative will as we find it, without regard to our own views as to the wisdom or justice of the act."

[31] To the extent the reasoning of *Schoonmaker* may be read to imply that an owner must know that the property is being used in proscription of the statute, we choose not to follow it.

significance of the abatement of Mrs. Bennis' interest in the vehicle. We assume, arguendo, that Mrs. Bennis did not have knowledge of or consent to the misuse of the Bennis vehicle, of which she was co-title owner. Historically, consideration was not given to the innocence of an owner because the property subject to forfeiture was the evil sought to be remedied.[32] As recently as the landmark forfeiture case, *Calero-Toledo v Pearson Yacht Leasing Co,* 416 US 663, 683; 94 S Ct 2080; 40 L Ed 2d 452 (1974), the United States Supreme Court has reflected this view: "the innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense."

In *Van Oster v Kansas,* 272 US 465, 467; 47 S Ct 133; 71 L Ed 354 (1926), the Supreme Court upheld the forfeiture and sale of an automobile used to transport liquor as proscribed by a Kansas statute. In declaring the vehicle a common nuisance, the Court rejected the innocent owner's Fourteenth Amendment due process claim because "the offense of unlawful transportation was committed by one entrusted by the owner with the possession and use of the offending vehicle."

In *Calero, supra,* the Supreme Court forfeited a lessor's interest in a yacht used to transport marijuana. The lessor had no knowledge that the yacht

[32] See, e.g., *The Palmyra,* 25 US (12 Wheat) 1, 14; 6 L Ed 31 (1827), in which Justice Story held that "[t]he thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing . . . ." In *United States v The Little Charles,* 26 F Cas 979, 982; 1 Brock 347 (CC D Va, 1818) (No. 15,612), Chief Justice Marshall held that the proceeding was "against the vessel, for an offence committed by the vessel, which is not less an offence, and does not the less subject her to forfeiture, because it was committed without the authority, and against the will of the owner." *Dobbins' Distillery v United States,* 96 US 395, 400; 24 L Ed 637 (1877), stated that "[b]eyond all doubt, the act of Congress in question attaches the offence to the distillery, and the real and personal property connected with the same . . . ." *Harmony v United States,* 43 US (2 How) 210, 238; 11 L Ed 239 (1844).

was used illegally.[33] Consistent with *Van Oster, supra*, the Court stated that it "has been implied that it would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent." *Calero, supra* at 689. *Calero* went further and stated in dicta that "the same might be said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property . . . ." *Id.*

Applying the principles of *Van Oster* and *Calero*, it is evident that Mrs. Bennis' claim is without constitutional consequence. Mrs. Bennis was a joint owner who explicitly or implicitly *entrusted* Mr. Bennis with the use and possession of their vehicle. *Van Oster, supra.* It is clear from *Calero* that the abatement of property stolen from the owner or taken without the owner's knowledge would be prohibited. However, on the basis of the facts before us, the argument cannot be made that the vehicle was stolen or initially driven without Mrs. Bennis' knowledge.

Moreover, in the Michigan forfeiture case, *People v One 1979 Honda Automobile*, 139 Mich App 651, 655-656; 362 NW2d 860 (1984), the Court of Appeals held that knowledge by one co-owner of the illegal activity was sufficient to forfeit the

[33] The Court ultimately held that the boat subject to forfeiture was voluntarily entrusted to a lessee who illegally used it and that, because there was no allegation or proof that the innocent lessor "did all that it reasonably could to avoid having its property put to an unlawful use," forfeiture was appropriate, despite the company's lack of knowledge. *Id.* at 690. The Court further stated that the contested forfeiture statutes "further the punitive and deterrent purposes that have been found sufficient to uphold, against constitutional challenge, the application of other forfeiture statutes to the property of innocents." *Id.* at 686.

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interest of both owners. The car was forfeited[34] in that case even though one of the titled owners had no knowledge of the illegal activities committed within the car. *Id.* The unconstitutionality of the forfeiture was not even considered.[35]

Having concluded that the abatement of the Bennis vehicle is not constitutionally infirm, we address the dissent's contention that "the trial court has broad discretion to fashion an appropriate remedy." *Post*, p 753. It is not contested that this is an equitable action. That being the case, it is critical to recognize that the trial judge considered alternatives on the record and, in the exercise of his discretion, fashioned an appropriate remedy, abating the entire interest in the vehicle. We merely sanction the trial judge's action, which is clearly permitted under the nuisance abatement statute, and find that such action was not an abuse of discretion.

Review of the controlling cases persuades us that no constitutional violation results from the abatement of Mrs. Bennis' interest in the vehicle. The United States Supreme Court indisputably allows forfeiture of an innocent owner's property, unless evidence was submitted that the property was stolen or used without the consent of the owner.[36] *Van Oster; Calero, supra.* Other jurisdic-

[34] The car was used to facilitate an illegal drug transaction.

[35] See also *In re Forfeiture of $53*, 178 Mich App 480, 495; 444 NW2d 182 (1989), in which the Court again considered the issue and this time determined that the forfeiture statute "was intended to establish a separate defense for *each* claimant who has a personal interest in the property as an owner." Although the Court did not forfeit the interest of the innocent owner, the decision was based on statutory construction, not a constitutional violation.

[36] We note the distinction between the situation in which a vehicle is used without the owner's consent and, although the owner consented to the use, it is used in a *manner* to which the owner did not consent. In the former, the innocent owner's interest could not be abated. *Van Oster; Calero, supra.* In the latter, as in the present case, the innocent owner's interest may be abated.

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tions addressing the issue have allowed the abatement of a co-owner's interest on strikingly similar facts." The Michigan nuisance abatement statute specifically obviates the requirement of proof, and because the statute does not violate the constitution, the Court of Appeals incorrectly held that proof of knowledge of the proscribed activity is required. Additionally, we do not find that the trial judge abused his discretion in fashioning an appropriate remedy, abating the entire interest of the vehicle.

V

In summary, we would hold that an act of lewdness as defined herein occurred and made the vehicle abatable. Moreover, reviewing the entire record, we find that an act of fellatio occurred so as to create a clear inference that it was for monetary compensation. Proof of an actual exchange of the money is not required by the statute or decisions of this Court. Thus, alternatively, we would hold that a complete act of prostitution occurred in the Bennis vehicle. Additionally, because the act occurred in a neighborhood that was a place reputed for prostitution and therefore a public nuisance, Mr. Bennis' vehicle contributed to

[37] Similarly, in *People v Garner*, 732 P2d 1194, 1196 (Colo, 1987), the Colorado Supreme Court held that the entire ownership of an abated vehicle *could not* be vested in the innocent co-owner wife. The court stated that the district court had "inherent equitable authority" to allocate a portion of the proceeds after costs to the innocent owner. Under the statute, however, the court *was not* obliged to do so. Further, in any event, the court could not award the innocent co-owner wife full ownership of the vehicle.

In *In re 1976 Blue Ford Pickup*, 120 Ariz 432, 435; 586 P2d 993 (Ariz App, 1978), the Arizona Court of Appeals upheld forfeiture of a truck jointly owned by a mother and son where the mother had no knowledge of the prohibited use of the truck. The son's illegal possession of marijuana subjected the truck to forfeiture, and the mother's status as an innocent owner could not "salvage the vehicle from the forfeiture occasioned through the activities of the joint owner."

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that continuing nuisance and may be abated. Finally, we would hold that the clear and unambiguous language of the Michigan nuisance statute obviates the requirement of an owner's knowledge of the proscribed activity and that the statute unquestionably passes constitutional muster. For all of the foregoing reasons, we would reverse the decision of the Court of Appeals.

BOYLE and MALLETT, JJ., concurred with RILEY, J.

GRIFFIN, J., concurred only in the result.

CAVANAGH, C.J. (*dissenting*). As Mr. Rogers would say, "It's a wonderful day in the neighborhood." In this public nuisance abatement case, the focus should be clear: Was the defendants' vehicle an abatable public nuisance? I cannot agree with the lead opinion's mystical concept that under the statute we can call the *condition* of an entire neighborhood a public nuisance. Nor can I agree with its invention that any vehicle contributing to this condition can be abated.

I remain unconvinced that the conduct at issue in the instant case comes within the scope of the public nuisance abatement statute. Assuming arguendo that it does, I do not believe that a single incident, absent circumstances giving rise to a reasonable inference of habitual and continuing nuisance activity, is sufficient to support abatement. Therefore I dissent.

I. THE SINGLE INSTANCE OF ACTIVITY ISSUE

Assuming arguendo that the conduct did fall within the scope of the public nuisance abatement statute, the issue becomes whether a single in-

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stance of that conduct establishes an abatable public nuisance.

The lead opinion states:

> [W]e must next determine whether an act of prostitution committed in a neighborhood known for illicit activity is within the purview of the statute. [*Ante*, pp 729–730.]

There are serious flaws with the mystical concept that follows. The lead opinion examines the *evidentiary* provision of the statute and finds the word "place." Yet, "place" is already used in the statutory provision that defines an abatable public nuisance, i.e., § 3801: "Any building, vehicle, boat, aircraft, or place . . . ." MCL 600.3801; MSA 27A.3801.

The lead opinion reasons:

> The nuisance abatement statute's use of the disjunctive "or" allows us to consider the reputation of the vehicle *or* the place to determine whether a nuisance exists. [*Ante*, p 733.]

The lead opinion then relies on the dictionary definition of "place" to reach "neighborhood." Relying on testimony about prostitutes in the neighborhood, the lead opinion concludes that this "condition" of the *neighborhood* is a public nuisance.

Note, the lead opinion would not hold that the *vehicle* is the nuisance. It cites *People ex rel Wayne Co Prosecutor v Sill*, 310 Mich 570; 17 NW2d 756 (1945), as support. In *Sill*, the *car* that was used for gambling purposes was declared the nuisance. *Id.* at 572. It also cites *State ex rel Wayne Co Prosecuting Attorney v Bernstein*, 57 Mich App 204; 226 NW2d 56 (1974). In *Bernstein*, the *bar* where the prostitutes were soliciting was declared the nuisance. *Id.* at 205. It also relies on

State ex rel Attorney General v Robinson, 250 Mich 99; 229 NW 403 (1930). There, the *apartment* where the act of prostitution occurred was declared the nuisance. *Id.* at 104. None of these cases supports the holding that the condition is the nuisance.

The lead opinion addresses the single incident issue in one short passage. It relies on *State ex rel Attorney General v Robinson, supra*.

In *Robinson*, the defendant's building contained fifty apartments. The building had a reputation for prostitution. A police officer witnessed a solicitation outside the building, watched two persons into the building, and arrested the pair when they came out of the building. The woman told the officer that they had used apartment 404. The trial court abated twenty-two of the apartments. This Court reversed the abatement order with respect to twenty-one of the apartments on the basis of the statutory provision that the nuisance activity must have occurred within thirty days of filing the complaint. *Id.* at 103. Since only the particular incident in apartment 404 had occurred within the thirty days preceding the filing of the complaint, the Court found that abatement of the other twenty-one apartments was improper. However, it abated apartment 404 on the basis of the incident observed by the police officer and because the Court found that the activity in that apartment was *not* an isolated event on the basis of the reputation of the building. *Id.* at 103-104.

Robinson is clearly distinguishable. The apartment was a permanent part of the building. Therefore, the reputation of the building is logically relevant to a permanent part of the building. Contrary to the statement of the lead opinion that the building in *Robinson* could not be abated, the *Robinson* Court stated that "if the apartment was

not identified, then the whole house might be closed." *Id.* at 104. Conversely, the vehicle in the instant case was not a permanent part of the "condition," as the lead opinion defines it. Furthermore, because the proper focus in this case is on the vehicle that the plaintiff sought to abate, the reputation of the area is not relevant to whether this particular vehicle is a public nuisance where the vehicle was not permanently connected to the area. Additionally, there is no evidence that continuing nuisance activity was occurring in *this* vehicle.

In the instant case, the lead opinion would hold:

> Where testimony surrounding proof of an incident of prostitution unequivocally establishes that the neighborhood has a reputation for prostitution, the property contributing to the continuance of the nuisance may be abated pursuant to the statute. [*Ante*, p 737.]

The subject of the holding, "property contributing to the continuance of the nuisance," is far too broad and unlimited in scope.

The prosecutor brought this action to abate the defendants' *vehicle*. The public nuisance abatement statute provides:

> Any . . . vehicle, . . . used for the purpose of lewdness, assignation or prostitution . . . , is declared a nuisance, . . . and all . . . nuisances shall be enjoined and abated as provided in this act and as provided in the court rules. [MCL 600.3801; MSA 27A.3801.]

The prosecution established only *one* incident of sexual activity involving *this* vehicle. Further, there was no evidence to create a reasonable inference that the sexual activity in *this* vehicle was habitual or continuing.

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The Court of Appeals majority followed the approach taken in *State ex rel Oakland Co Prosecutor v Motorama Motel Corp*, 105 Mich App 224; 307 NW2d 349 (1981), to find that a single incident of lewdness was not sufficient. The *Bennis* majority reasoned:

> The *Motorama* approach best effectuates the purpose of the statute. The abatement statute was enacted to subject houses of prostitution to abatement as nuisances. *State ex rel Wayne Co Prosecutor v Diversified Theatrical Corp*, 396 Mich 244, 246-250; 240 NW2d 460 (1976). The purpose of the act has also been described as eliminating the use of property in connection with gambling, prostitution, and the illicit sale of liquor. *People ex rel Wayne Prosecuting Attorney v Sill*, 310 Mich 570, 575; 17 NW2d 756 (1945); *State ex rel Oakland Prosecuting Attorney v Ginell*, 159 Mich App 679, 681-682; 407 NW2d 59 (1987). The statute is not intended to regulate the morality of individuals, or to prevent incidents of immorality in, for example, hotels that are otherwise respectable establishments. See *Diversified Theatrical Corp, supra*, 247.
>
> As in *Motorama*, we hold that a single incident is insufficient to establish a nuisance. Further, the circumstances of this case do not permit a reasonable inference that the conduct was habitual. In this case, the prosecution has alleged only a single incident to support the contention that defendants' car was a nuisance. While the prosecution discusses at length the reputation and record of . . . the woman found in the car with Mr. Bennis, this does not establish that defendants' car was used on more than that occasion for lewdness, assignation, or prostitution. Similarly, testimony was presented that Mr. Bennis was seen on more than one occasion driving in that area and talking to women. Not only does this observed conduct not prove that defendant was involved in lewdness, assignation, or prostitution, there was no evidence to establish that this conduct, if it occurred, took

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> place in the vehicle in question. In fact, defendants allegedly purchased the car only three weeks before the incident that gave rise to this action. [200 Mich App 675-676.]

In *Motorama*,[1] the panel stated that "[a] nuisance involves the notion of repeated or continuing conduct and should not be based upon proof of a single isolated incident unless the facts surrounding that incident permit the reasonable inference that the prohibited conduct was habitual in nature." *Motorama* at 229-230, citing *People v Bitonti*, 306 Mich 115, 119-120; 10 NW2d 329 (1943).

I would continue this limitation.[2] The New York Court of Appeals similarly follows this approach:

> [W]e do not hold, that any premises on which an isolated act of lewdness, assignation or prostitution occurs is subject to the remedies of [the houses of prostitution abatement statute]. Rather, we agree . . . that "the People will have to show a *consistent pattern* of conduct sufficient to prove that the premises are being employed for a proscribed use." The most significant factors in mak-

[1] In *Motorama*, the defendant's hotel was across the street from a bar that was frequented by persons engaged in prostitution. The Court held that the single incident at the hotel was insufficient to support abatement of a nuisance.

[2] See 58 Am Jur 2d, Nuisances, § 77, p 730:

> Nuisance, as a general rule, involves the idea of continuity or recurrence; the maintenance of a nuisance ordinarily implies a continuity of action over a substantial period of time, and the continuance of the acts constituting the nuisance for an unreasonable period. Thus, it has been said that to constitute a nuisance there must be a continuousness or a recurrence of the acts by which it is created.

See, generally, Glesner, *Landlords as cops: Tort, nuisance & forfeiture standards imposing liability on landlords for crime on the premises*, 42 Case W Res L R 679, 716-737 (1992). "Arrests can constitute evidence of a nuisance, but they must be sufficiently frequent to establish a *habitual* illegal use of the property." *Id.* at 732 (emphasis added).

> ing this factual determination will be the frequency of the conduct, the knowledge or even encouragement by the defendant of its existence, and the extent of the benefit, direct or indirect, derived by defendant from such activity. [*People ex rel Arcara v Cloud Books, Inc*, 65 NY2d 324, 331; 491 NYS2d 307; 480 NE2d 1089 (1985) (emphasis added) (citation omitted), rev'd on other grounds 478 US 697 (1986) (first amendment issue), modified on remand 68 NY2d 553; 510 NYS2d 844; 503 NE2d 492 (1986).][3]

Further, the public nuisance abatement statute is aimed at property that has become so associated with the activity that it has become part of the activity. In *State ex rel Carroll v Gatter*, 43 Wash 2d 153, 160; 260 P2d 360 (1953), the Washington Supreme Court construed its state's "red-light" statute, which, like Michigan's "red-light" statute, i.e., the public nuisance abatement statute, was derived from the Iowa abatement statute.[4] It explained the function of the statute:

> To sustain the application of the act, it must be shown to the satisfaction of the court, by a preponderance of the evidence, that the premises were being used as a house of lewdness, assignation, or prostitution as that term is generally understood. The "use" of the premises of which the statute speaks, requires more than a showing that sporadic acts of prostitution occurred therein. . . .
>
> The statute is not directed to the abatement of commercial eroticism—that is governed by the criminal statutes. It is directed to the abatement of premises which, by reason of sufficient happenings therein, *have absorbed and taken the charac-*

[3] See also *New York City v Big Apple Spa*, 130 Misc 2d 920, 923; 497 NYS2d 988 (1986): "One incident of prostitution has been established. An isolated incident is, of course, not enough."

[4] See *State ex rel Wayne Co Prosecutor v Diversified Theatrical Corp*, *supra* at 246-247.

ter of the acts committed, and have in fact become houses of lewdness, assignation or prostitution. [*Id.* at 160. Emphasis added.]

Additionally, the use of the vehicle in the instant case is distinguishable from the use of vehicles in the "numbers racket" gambling cases because the use of the Bennis vehicle was not "essential" to the act of gross indecency. The vehicle was merely a convenient location. By contrast, this Court has held that in the numbers racket situation "[t]he use of automobiles as *essential tools* in this type of gambling is generally recognized." *Sill* at 575 (emphasis added). Where the vehicle is an *essential* tool to accomplish continuing nuisance activity, the argument that a single act is sufficient is much stronger.

In the instant case, I would find that there was no evidence to support a reasonable inference of continuing or habitual illegal activity. Therefore, it was improper to abate the defendants' vehicle.

II. THE KNOWLEDGE ISSUE

As explained above, I do not believe that the conduct at issue was within the scope of the public nuisance abatement statute, nor was it proven to be of a continuing nature. However, in anticipation of cases that do involve proscribed nuisance activity, I address the proof of knowledge issue.

Beginning with *People v Schoonmaker*, 241 Mich 177; 216 NW 456 (1927),[5] two lines of contrary precedent have developed through Michigan

[5] In *Schoonmaker*, the Court considered whether a public dance hall was an abatable public nuisance under an earlier version of this statute. The defendants did not serve alcohol on the premises, but some of their patrons secretly slipped outside the building during the dance to consume alcohol. The Court addressed the threshold of conduct required on the part of the defendant:

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case law regarding whether the plaintiff must show that the owner of the property knew that the nuisance activity was occurring before the property can be abated.[6] In the instant case, the lead opinion addresses the issue and concludes that proof of knowledge is not required. The statute clearly provides that proof of knowledge is not required.[7] And, although abating the property of innocent owners in forfeiture actions arguably does not violate an owner's constitutional right to due process,[8] that does not make such forfeitures fair or equitable.

> Defendants did not maintain a nuisance unless they permitted such illegal use of the premises; that is, consented to it or acquiesced, and whether they did so was a question of fact . . . .
>
> . . .
>
> One inviting the public to his place for commercial purposes must take care not to invite or acquiesce in transgressions of the law. That transgressions may happen is possible, but remain offenses of the wrongdoer unless tolerated by the occupant to the extent of permissive use of the premises for such purpose or indifference thereto. The statute does not deprive one person of the use of his property by reason of the illegal acts of another, unless the owner's use bears a participating relation to the violation. [*Id.* at 181.]

See *State ex rel Wayne Co Prosecutor v Levenburg*, 406 Mich 455, 462, n 1; 280 NW2d 810 (1979); *State ex rel Oakland Co Prosecutor v Motorama Motel Corp*, *supra* at 228; *State ex rel Wayne Co Prosecutor v Weitzman*, 21 Mich App 705, 710-711; 176 NW2d 463 (1970).

[6] Other cases held that the statute obviated the need for proof of knowledge. See *Bitonti* at 119 (plurality); *Robinson* at 103; *State ex rel Oakland Co Prosecutor v Weaver*, 74 Mich App 462, 464; 254 NW2d 68 (1977).

[7] MCL 600.3815; MSA 27A.3815.

[8] See *Calero-Toledo v Pearson Yacht Leasing Co*, 416 US 663; 94 S Ct 2080; 40 L Ed 2d 452 (1974).

In the instant case, after reviewing cases from the United States Supreme Court, the majority states:

> The United States Supreme Court indisputably allows forfeiture of an innocent owner's property, unless evidence was submitted that the property was stolen or used without the consent of the owner. [*Ante*, p 742.]

This statement sweeps too broadly. The statement should be limited

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The abatement of public nuisances is an equitable action. MCL 600.3805; MSA 27A.3805. See MCR 3.601; 58 Am Jur 2d, Nuisances, § 321, pp 911-912. As such, the trial court has broad discretion to fashion an appropriate remedy.[9] 58 Am Jur 2d, Nuisances, § 355, pp 946-947. Historically, an equity court would not enjoin criminal activity, except in nuisance cases. See Dobbs, Remedies (2d ed), § 2.9(3), p 169. One must remember that the public nuisance abatement action arose in equity because the available legal remedies, i.e., criminal penalties, were inadequate to stop future and continuing injury.[10] Correspondingly, equity courts have shown reluctance to intervene where the activity is criminal. In *People v Lim*, 18 Cal 2d 872; 118 P2d 472 (1941), the California Supreme Court considered whether a gambling establishment could be abated in the absence of a specific statutory provision. It explained the reluctance of equity courts to intervene:

> Conduct against which injunctions are sought in behalf of the public is frequently criminal in nature. While this alone will not prevent the intervention of equity where a clear case justifying equitable relief is present . . ., it is apparent that the equitable remedy has the collateral effect of depriving a defendant of the jury trial to which he would be entitled in a criminal prosecution for violating exactly the same standards of public policy. . . . The defendant also loses the protection of the higher burden of proof required in criminal prosecutions and, after imprisonment and fine for violation of the equity injunction, may be subjected under the criminal law to similar punishment for the same acts. For these reasons *equity is loath to interfere* where the standards of public policy can be enforced by resort to the criminal law, and in the absence of a legislative declaration to that effect, the courts should not broaden the field in which injunctions against criminal activity will be granted. [*Id.* at 880. Emphasis added.]

to due process considerations. The United States Supreme Court has recently held that forfeitures of property under 21 USC 881, the drug forfeiture statute, are subject to the excessive fines constitutional provision. *Austin v United States*, 509 US —; 113 S Ct 2801; 125 L Ed 2d 488 (1993).

[9] This Court has recognized this broad authority: "Of the transcendent power in an equity court, under its general jurisdiction, to restrain and abate a continuing public nuisance for which, by reason of its extent and nature, there is no plain and adequate legal remedy, there can be no question." *Detroit v Highland Park*, 186 Mich 166, 182; 152 NW 1002 (1915).

[10] See *Marsland v Pang*, 5 Hawaii App 463, 475-478; 701 P2d 175 (1985) (reviewing an equity action for nuisance abatement). See, generally, Patterson, *California land use regulation post* Lucas: *The history and evolution of nuisance and public property laws portend little impact in California*, 11 UCLA J of Envtl & Poly L 175, 186-197 (1993) (history of public nuisance). See *Lucas v South Carolina Coastal Council*, 505 US —; 112 S Ct 2886; 120 L Ed 2d 798 (1992).

Particularly, where there is no evidence that the conduct at issue will be continuing in the future, the court should hesitate to exercise its equitable powers to abate the property.[11]

Consequently, I would hold that the trial court, exercising its equitable discretion, should consider the equities and circumstances of each case and tailor the remedy to fit the situation. See *People ex rel Wayne Co Prosecutor v Tate*, 306 Mich 667, 669; 11 NW2d 282 (1943) (the decision to deny an abatement order is within judicial discretion).

The Court in *People v Garner*, 732 P2d 1194 (Colo, 1987), illustrated the remedial possibilities for situations involving innocent parties.[12] The

[11] See 58 Am Jur 2d, Nuisances, § 324, p 913 ("injunctive relief against nuisances should be cautiously given").

[12] The *Garner* court explained:

> [T]he court in the exercise of its equity powers had the authority to order a sheriff's sale of the vehicle on the condition that one-half of the proceeds of the sale, after deduction of

Garner court noted the equitable powers of the trial court:

> Our construction of the Public Nuisance Statute to require the forfeiture of a jointly owned vehicle determined to be a public nuisance, even though one of the co-owners is innocent of any wrongdoing, does not mean that the innocent party's interest in the vehicle may not be recognized and conserved. On the contrary, an action for an abatement of a . . . public nuisance is equitable in nature, . . . and while a court in the exercise of its equity powers may not act contrary to statutory mandate, it does retain a considerable degree of discretion and flexibility in fashioning a decree that achieves a fair result under the particular circumstances of the case. . . . In a forfeiture situation, therefore, a court retains the authority to protect, to the extent practicable and within the framework of the statutory dispositional alternatives, the interest of the innocent party. [*Id.* at 1197. Citations omitted.]

For instance, a trial court could order the property sold, with proportionate net proceeds to be paid to innocent owners, or the court could allow the innocent owners to bid at the sale and acquire full ownership interest, or the government agency itself could pay the proportionate net worth directly to the innocent owners. By leaving such a determination to the equitable discretion of the trial court, each case will be decided on its own merits.

In the instant case, the vehicle was jointly

> fees and costs incident to the seizure and the abatement action, be paid to [the ex-wife], or that [the ex-wife] be given the opportunity to bid at the sheriff's sale on the forfeited interest of [the husband] and thereby acquire the entire interest in the vehicle, or that the vehicle be delivered to the seizing agency . . . upon the agency's payment of one-half of the fair market value of the vehicle to [the ex-wife]. [*Id.* at 1198-1199.]

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owned by Mr. and Mrs. Bennis. Mrs. Bennis had no knowledge that her husband used the vehicle to engage in an act of gross indecency. Assuming arguendo that his conduct came within the reach of the abatement statute, I would hold that the trial court should tailor a remedy to protect her property interest.

In reaching its conclusion that Mrs. Bennis' property interest may be abated, the lead opinion cites *People v One 1979 Honda Automobile,* 139 Mich App 651; 362 NW2d 860 (1984), to support its proposition that proof of knowledge is not required. Its reliance is misplaced. There, the arrangement between the co-owners, a father and his daughter, was really a secured transaction.[13] The father loaned his daughter money to purchase the car. The daughter was the sole driver of the car. The forfeiture action arose because of her use of the car to make a delivery of marijuana. In the drug statute forfeiture provisions there is an exemption for innocent owners. The issue was whether the father's lack of knowledge exempted the vehicle from forfeiture. Instead, the panel focused on the daughter's knowledge and found it sufficient to support forfeiture. The panel did not address the effect of forfeiture on the father's interest. Additionally, *1979 Honda* did not arise under the nuisance abatement statute. Further, this case is factually distinguishable because Mr. and Mrs. Bennis owned the vehicle as joint owners —not as lender/borrower.

The lead opinion tries to distinguish *In re Forfeiture of $53,* 178 Mich App 480; 444 NW2d 182 (1989), because it was based on statutory construc-

[13] A father and a daughter were co-title owners of the car. However, the father did not live with his daughter, his address was not on the registration, the daughter had sole possession of the car, and she paid all the insurance premiums.

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tion—not constitutional violation. There, the panel thoroughly considered the statutory "innocent owner" defense found in MCL 333.7521; MSA 14.15(7521). The panel examined federal and state law interpretations. The panel concluded:

> To summarize, we conclude that § 7521(1)(d)(ii) was intended to establish a separate defense for each claimant who has a personal interest in the property as an owner. Hence, where the prosecution commences an action against a conveyance that is used for unlawful narcotics activity, the forfeiture of the res is subject to the interest of a co-owner who proves that the proscribed act was done without his or her knowledge or consent, express or implied. *The state may only forfeit the ownership interest of the noninnocent owner.* If, for example, the innocent owner has a fifty percent interest in the vehicle, the property may be sold and the proceeds divided equally between the state and the innocent co-owner. [*Forfeiture of $53* at 495-496. Emphasis added.]

Even though this *Forfeiture of $53* arose under a different statute, I believe that it supports an approach that protects innocent co-owners.

In the case at bar, the lead opinion also cites *In re 1976 Blue Ford Pickup*, 120 Ariz 432; 586 P2d 993 (Ariz App, 1978). While it is true that the court upheld the forfeiture of the mother's joint interest in the truck, the court did so after focusing on the unique facts of the case.[14] Arguably, the case was the exception to the general rule. The vehicle was titled in the names of mother *or* son. Under Arizona law, such a title allows *either* joint owner to transfer complete ownership interest in

[14] The mother bought the car with her own money and originally titled the car in her name *and* her son's name. The son moved to Arizona, and the title was changed to mother *or* son. *Id.* at 433-434.

the vehicle without consent of the other."[15] Further, the son had exclusive possession of the vehicle in another state. Unfortunately for the mother, she could have preserved her interest had she been a secured creditor, rather than co-owner. *Id.* at 435.

Notwithstanding its determination of the outcome, the *Blue Ford Pickup* court cited with approval the general rule that innocent owners will not lose their interests:

> "[A]n automobile may *not* be forfeited . . . unless the owner has some connection with the unlawful act, or intended to permit the automobile to be used by a third person in the commission of the unlawful act, or had knowledge it was to be so used. This is in line with the trend of the more recent decisions of the United States Supreme Court in the protection of constitutional rights, both of person and property." [*Id.* at 434, quoting *In re One 1965 Ford Mustang*, 105 Ariz 293, 300; 463 P2d 827 (1970). Emphasis added.]

III. CONCLUSION

I disagree with the conclusion of the lead opinion that the "condition" of the "neighborhood" is the public nuisance. I also disagree with the position of the lead opinion that a single act of prohibited conduct is sufficient to support abatement, without evidence that the conduct is habitual or continuing. Public nuisances, by their very nature, imply a continuing condition. The public nuisance abatement statute is aimed at property that has become so associated with an activity that it has become part of the activity. In the instant case, the vehicle was only a convenient site for the activity to occur. This situation is far different

[15] The statute requires consent to such transfers at the time joint owners obtain such a certificate of title.

from shutting down a building, i.e., a brothel or a crack house, that has become so associated with the illegal activity that it has become part of the activity. Here, the vehicle can be driven out of the "neighborhood" without becoming permanently tainted as a lewd or prostitution vehicle. Additionally, this situation is far different from shutting down a gambling operation that, as an *essential part of its operation,* uses the vehicles to transport betting slips and money.

In conclusion, I would hold that the activity that occurred in this vehicle is insufficient to subject it to abatement under the public nuisance abatement statute.

I would affirm the judgment of the Court of Appeals.

LEVIN and BRICKLEY, JJ., concurred with CAVANAGH, C.J.

LEVIN, J. (*dissenting*). The nuisance abatement statute, as originally enacted in 1915, declared that a "building or place" used for the purpose of prostitution was an abatable nuisance.[1]

Ten years later, during the Prohibition era, "building or place" was amended to add "vehicle," so that it read "building, *vehicle* or place." For the purpose of "prostitution" was changed to read for the purpose of "prostitution or gambling," and to include such a building, vehicle, or place "used by, or kept for the use of prostitutes or other disorderly persons," or used for the manufacture of, or trafficking in, intoxicating beverages.[2]

[1] 1915 PA 272 reading in part as follows:

> Section 1. Whoever shall conduct, maintain, own or lease any building or place used for the purpose of lewdness, assignation or prostitution is guilty of a nuisance, and the building or place in or upon which such lewdness, assignation or prostitution is conducted, permitted or carried on, and the furniture, fixtures, and contents are also declared a nuisance, and shall be enjoined and abated as hereinafter provided.

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I

In the seventy years since the 1925 enactment adding the word "vehicle," there has been no prior reported prosecution of a person for the use of a vehicle for the purpose of prostitution. It thus appears that no automobile used by a man to visit a house of prostitution, or to visit a hotel or apartment house frequented by prostitutes, was abated as a nuisance.[3]

[2] 1925 PA 389 reading in part as follows:

> Section 1. Any building, vehicle or place used for the purpose of lewdness, assignation or prostitution or gambling, or used by, or kept for the use of prostitutes or other disorderly persons, or used for the unlawful manufacture, storing, possessing, transporting, sale, keeping for sale, giving away, bartering, furnishing or otherwise disposing of any vinous, malt, brewed, fermented, spirituous or intoxicating liquors or any mixed liquors or beverages, any part of which is intoxicating, is hereby declared a nuisance and the furniture, fixtures and contents of any such building, vehicle or place, and all such intoxicating liquors therein are also declared a nuisance, and all such nuisances shall be enjoined and abated as hereinafter provided. Any person, or his servant, agent or employe who shall own, lease, conduct or maintain any building, vehicle or place used for any of the purposes or by any of the persons above set forth or where any of the acts above enumerated are conducted, permitted or carried on, is guilty of a nuisance.

The foregoing statutory provision was amended by 1951 PA 80 to add "boat" and "aircraft" as property subject to abatement and forfeiture, and to add trafficking in "narcotic and/or hypnotic drugs" as illicit businesses.

1988 PA 2 substituted "controlled substance" for "narcotic and/or hypnotic drugs."

The current statute, MCL 600.3801; MSA 27A.3801, is set forth in the majority opinion, n 1.

[3] No taxicab, even a taxicab that had been waiting outside a bar frequented by prostitutes, was abated as a nuisance.

No automobile used by a prostitute who hailed men from the vehicle, or who used the vehicle to make a house call, was abated as a nuisance.

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The statute has not heretofore been employed to abate the use of property by someone who was not himself engaged in the illicit activity as a business.[4]

I would hold that a vehicle is not subject to a nuisance abatement action unless the person owning or in lawful possession of the vehicle is engaged in and uses the vehicle in the conduct of illicit activity, described in the statute, as a business.

II

The lead opinion states: "Where testimony surrounding proof of an incident of prostitution unequivocally establishes that the neighborhood has a reputation for prostitution, the property contributing to the continuance of the nuisance may be abated pursuant to the statute."[5] The lead opinion concludes that "the act of prostitution occurring in the Bennis vehicle in a neighborhood known for prostitution" was an abatable nuisance.[6]

The lead opinion thus would hold that a vehicle used by a customer of a prostitute becomes an abatable nuisance when such use contributes to a preexisting prostitution nuisance in a neighborhood, and that a vehicle may be found to so contribute when it is driven to a neighborhood

I do not wish to be understood as saying that a taxicab so used, or an automobile so used by a prostitute, might not be subject to abatement.

[4] In the following cases, vehicles were found to be nuisances on evidence tending to show that they were used in gambling enterprises. See *People ex rel Wayne Co Prosecutor v Bitonti*, 306 Mich 115; 10 NW2d 329 (1943); *People ex rel Wayne Co Prosecutor v Tate*, 306 Mich 667; 11 NW2d 282 (1943); *People ex rel Wayne Co Prosecutor v Sill*, 310 Mich 570; 17 NW2d 756 (1945); *State ex rel Wayne Co Prosecutor v Martin*, 314 Mich 317; 22 NW2d 381 (1946).

[5] *Ante*, p 737.

[6] *Id.*, p 737.

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where prostitutes congregate and is used in the commission of an act of prostitution in such a neighborhood.

The lead opinion thus appears to recognize that ordinarily the occasional use by a person, not himself engaged in an illicit activity as a business, of his vehicle to participate in illicit conduct, was not intended by the Legislature to permit the declaration of the vehicle as an abatable nuisance even though the customer's conduct might be punishable as a criminal offense.

The reasoning of the lead opinion would mean that a customer's vehicle used for prostitution may be abated as a nuisance when driven to and so used on Eight Mile Road in Detroit, but not when so used in Northville or Charlevoix. Some prosecutors and judges may think that way, but legislators do not.

I suggest that compliance with the admonishment, quoted approvingly by the lead opinion, that "[w]e have no other duty to perform than to construe the legislative will as we find it,"[7] requires that we not attribute to the Legislature an intent to permit the seizure of a customer's vehicle, only occasionally used in illicit activity, when the customer is not himself engaged in the illicit activity as a business.

The Legislature may, of course, amend the statute to provide for the seizure of customer vehicles, but, if the Legislature does so, it will surely so provide without regard to the neighborhood in which the customer of a prostitute uses his vehicle, whether in Northville, Charlevoix, or Detroit.

III

Among the least persuasive arguments advanced

[7] *McKibbin v Corp & Securities Comm*, 369 Mich 69, 81; 119 NW2d 557 (1963), quoted approvingly, *ante*, p 739, n 30.

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by the lead opinion is the contention that "place" means the neighborhood, and that it must be so construed to give meaning to all the words in the statute.[8] The word "place" was part of the original enactment, "building or place."[9] The Legislature had in mind that there might be a place that was not a building that might be used for prostitution that should be subject to an abatement action.

The general reputation of the place was admissible under the statute for the purpose of showing that the place is a nuisance.[10] An automobile was not such a place when this legislation was first enacted in 1915. Vehicles were not added until 1925, at which time the Legislature distinguished between the general reputation of a building, and of a vehicle, and of a place.[11] The general reputation of a place may be considered for the purpose of showing that the place is a nuisance, and of a vehicle for the purpose of showing that the vehicle is a nuisance.[12] But the general reputation of a place where the vehicle is driven or used may not, under the statutory provision for use of general reputation evidence, be relied on for the purpose of showing that the vehicle is a nuisance.

Unless a vehicle is itself a nuisance, it is not subject to abatement, and it is not within the intendment of the statute.

Unless a place is itself a nuisance, i.e., a place used for the purpose of prostitution, or used by or

[8] *Ante*, p 733.

[9] See n 1.

[10] 1915 PA 272, § 3.

[11] 1925 PA 389, § 9. See n 12.

[12] In any action brought under this chapter, evidence of the general reputation of the building, vehicle, boat, aircraft or place is admissible for the purpose of proving the existence of the nuisance. [MCL 600.3815(1); MSA 27A.3815(1).]

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kept for the use of prostitutes, it is not subject to abatement, and it is not within the intendment of the statute. The Legislature clearly did not intend that an entire residential neighborhood where prostitutes roam was, as a place, subject to abatement.

IV

The reliance of the lead opinion on the statutory language stating that the prosecutor is not required to provide "[p]roof of knowledge of the existence of the nuisance on the part of the defendants or any of them,"[13] to justify its conclusion that an innocent owner's share of the property is subject to forfeiture, is misplaced. This statutory provision only relieves the prosecutor of the burden of showing such knowledge as part of his prima facie case that there is a nuisance subject to abatement.[14]

This statutory provision does not make an owner's lack of knowledge immaterial or irrelevant regarding whether property that is subject to abatement as a nuisance should be forfeited. As a matter of statutory construction, I would hold that an innocent co-owner's share of the vehicle is not subject to forfeiture. Such a construction is especially called for where the Court by construction today enlarges the application of the nuisance abatement statute beyond its letter and beyond any prior application in its seventy-year history.

[13] MCL 600.3815(2); MSA 27A.3815(2).

[14] See 2 McCormick, Evidence (4th ed), § 342, Presumptions in General, pp 449 ff; § 343, Reasons for the Creation of Presumptions: Illustrative Presumptions, pp 454 ff; § 344, The Effect of Presumptions in Civil Cases, pp 460 ff.

See also LaFave & Scott, Criminal Law (2d ed), § 213, Constitutional Limitations—Due Process and Statutory Presumptions, Defenses, and Exceptions, pp 158 ff.

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Order

Entered:

December 30, 1994

Michigan Supreme Court
Lansing, Michigan

Michael F. Cavanagh
Chief Justice

Charles L. Levin
James H. Brickley
Patricia J. Boyle
Dorothy Comstock Riley
Robert P. Griffin
Conrad L. Mallett, Jr.
Associate Justices

PEOPLE OF THE STATE OF MICHIGAN
ex rel WAYNE COUNTY PROSECUTOR,

Plaintiff-Appellant,

v

JOHN C. BENNIS and TINA B. BENNIS,

Defendants-Appellees.

SC 97339
CoA 132568
LC 88-824379-CZ

This cause having been brought to this Court by appeal from the decision of the Court of Appeals and having been argued by counsel and due deliberation having been had thereon by the Court, IT IS HEREBY ORDERED that the judgment of the Court of Appeals is REVERSED in conformity with the opinion filed herein.

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I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

January 23, 1995

Corbin R. Davis

Clerk